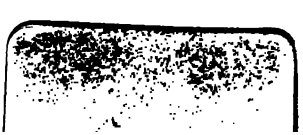

THE

ANOMALOUS CONDITION

OF

ENGLISH JURISPRUDENCE

CONSIDERED WITH ESPECIAL REFERENCE TO A

PROPOSED FUSION

OF

LAW AND EQUITY.

BY

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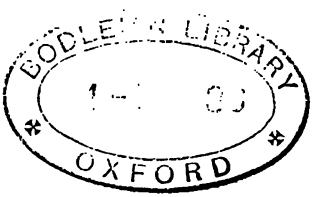

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ADVERTISEMENT.

THIS pamphlet was first published three years ago. Encouraged by the increasing demand for Law Reform throughout the country since that time, I now re-issue the remaining unsold copies of it, bringing it down to the date of the present period. For notwithstanding that a few anomalies pointed out in it, and which the learned reader will readily distinguish, have since met with at least a partial cure, THE CROWNING ONE of all still remains in full force, though signs are not wanting that attention is being attracted, both at home and abroad, even to *its* removal.

What cause indeed is there not for hope to the sincere Law Reformer! What works of amelioration has not the year now closing in on us, accomplished! It has seen principles of Jurisprudence held in unquestioning veneration for centuries, abolished by a stroke of the Chancellor's pen; it

has seen the framework of Chancery suits compressed within dimensions no larger than those of a common bill stamp; it has seen the Gordian knot of Common Law entanglements unravelled by the almost instantaneous adjudication of the extended County Courts. It has seen an act of Parliament* passed with acclamation, which an Hardwicke and an Eldon would have shuddered to think possible; it has seen candidates† on the hustings pledging themselves, as to a cardinal doctrine of their political creed, vigorously to carry out Law Reform; it has seen the public press teeming day by day with leading articles upon the same great subject. It is hardly then too much to hope and believe that the present generation may yet live to witness even those more fundamental and organic changes advocated in the following pages.

C. F. T.

Rusper, Horsham, Dec. 1850.

* Mr. Turner's Bill for Chancery Reform.

† See especially Her Majesty's present Solicitor-General's address to his Southampton constituents.

TO

THOSE FOUR EXALTED PERSONAGES,

WHO

HAVING ADMINISTERED THE SUPREME JUDICIAL

OFFICES OF STATE,

AND RETAINING,

AMIDST THE REPOSE OF A LESS PUBLIC SPHERE,

AND THE WELL EARNED HONOURS OF ADVANCING YEARS,

THE MIGHT OF THEIR HIGH INTELLECTS,

ALONE POSSESS THE WISDOM TO DESIGN,

THE AUTHORITY TO SUGGEST,

AND THE LEISURE TO EXECUTE,

THE GRAND SOCIAL BLESSING OF A REFORMED

NATIONAL JURISPRUDENCE,

THESE PAGES

ARE VERY HUMBLY AND RESPECTFULLY INSCRIBED.

SINCE the following pages were prepared for the press, I have read with much interest Mr. Phillimore's 'Letter to the Lord Chancellor on the Reform of the Law.'

Convinced as I am that nothing but an agitation of the subject, even to importunity, and a multiplication of efforts—feeble, it may be, taken singly, but strong in their combination, as manifestations of a wide-spread conviction—can avail in arousing the Legislature to the sweeping changes in the Law, which Reason and Justice demand, I should, probably without hesitation, have submitted to the public the following inquiry, even at the risk of treading upon ground already pre-occupied by Mr. Phillimore. But the field is so wide, and the particular lines of thought, which we have pursued in it, are so distinct, that all fear of such interference is removed; and I find, that the points to which attention is principally invited in the following pages, are not amongst those to which Mr. Phillimore has so ably addressed himself.

C. F. T.

PREFACE.

THE design of the following treatise is to lay, as plainly as possible, before the unprofessional reader, an outline of the discordant and perverted state of our present Juridical System, as it relates to the Laws of Property, and especially of the obstructions to the Administration of Justice, which flow from a Severance of the Tribunals of Law and Equity.

Two difficulties beset, at the outset, the successful treatment of *such* a matter, with *such* an intent. On the one hand, the nature of the subject itself, and the necessity, *in order to test facts*, of sometimes entering into professional details, will give to portions of our inquiry somewhat of a technical character;—whilst on the other, the desire, which has been uppermost in my mind, of rendering a subject naturally encumbered with technical phraseology universally accessible, has prevented that condensation, of which it would have admitted, if addressed to the profession, either alone, or principally.

Moreover, I am aware that I have approached a subject, which requires all the tact of the discreet, the research of the profound, and the energy of the enthusiastic, Jurist. Would that the task of dealing with it had devolved upon such an one! My excuse for venturing upon it at all, is to be found only

in an honest conviction of its immeasurable importance—of the urgency of the call for Reformation—and of the well-known unwillingness to grapple with it, of those most fitted to do so.* Neither am I unconscious that it is open, even to those who may vouchsafe to the subject the unprejudiced investigation which it requires, and be most disposed to put a favourable construction upon my attempt, to object, that it contains an exposure of the present system, rather than a remedy for it; and that Criticism is not Cure. To this I will only reply, that as the detection of error must precede its removal, I shall feel myself more than repaid, if I succeed in drawing any minds seriously to the subject, and enlisting them in the cause of sound Reform; that I am content to leave it to the candour of the reader to decide, upon the case as stated in the following pages, whether the evils complained of are made out to his satisfaction, or not;—and if made out, whether they ought not to be abated:—and that though the suggestions for future improvement which I have advanced, would doubtless fall far short of effecting an accomplished Reformation of the Laws of Property, yet they are, it is humbly submitted, in accordance with the principles of a more healthful Jurisprudence, and calculated to give an impetus and direction to ulterior movements.

C. F. T.

Lincoln's Inn, December 1847.

* See Mr. Phillimore's excellent remarks on this point, 'Letter,' pp. 12 et seq.

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THE

ANOMALOUS CONDITION

OF

ENGLISH JURISPRUDENCE.

CHAPTER I.

ON THE COMMON LAW.

THAT we live in a land calling itself, The Enlightened among Nations, whose Ordinary Courts of Justice necessarily become, if they only faithfully apply to practice their principles of decision, Instruments of Injustice; the administration of whose Laws is confided to a Judicature, which cannot choose but defeat the very objects it was called into existence to effect,—are propositions so monstrous and alarming, as to challenge the attention of the most careless. The mind, indeed, shrinks instinctively, the lip curls incredulously, at their mere enunciation: yet that the paradox is as true, as it is incredible, the following passages, each a sentence solemnly delivered by no mean Judge, will place beyond the possibility of doubt.

'Early in the history of our Jurisprudence, the administration of Justice by the Ordinary Courts appears to have been incomplete; and to supply the defect, the Courts of Equity have erected their Jurisdiction, assuming the power of preventing the principles upon which the Ordinary Courts decide, when enforced by them, from becoming (contrary to the principles of their original establishment) instruments of injustice.' *

'Again—where the proceedings in the Courts of Law, under writs which he [the Chancellor] had issued, were grossly defective and inequitable, he was naturally called on to review them, and to prevent judgments which had been fraudulently obtained, from being carried into effect.' †

'Then followed cases, in which it was necessary to correct the absurdities of the Common Law Judges, who, in their own Courts, laid down rules utterly subversive of Justice.'‡

Here then is a plain fact from which to start, namely, that the Common Law tribunals, which were instituted to be the guardians of the liberties and rights of the subject, have failed of their design. How has this happened? What is the cause of this fearful anomaly of judicial degeneracy? Why is it, how has it ever become possible, that a Magistracy born to protect, virtually defeats, the social

* Lord Redesdale on Pleadings in Chancery, p. 4. [4th Edition.]

† Lord Campbell's Lives of the Chancellors, vol 1. [1st. series.] page 9.

‡ Ibid. page 10, and note.

rights of a nation? I answer. Not because these tribunals were based upon vicious or defective principles, but because those principles, being originally sound, unconditional, boundless, have been abandoned; and their natural elasticity compressed within the narrow, artificial, circle of an arbitrary codification.

In order to make this appear, let us first clearly understand, what is meant by the familiar, but much mistaken term, Common Law.

The Common Law portion of the Laws of this country may be described, *negatively*, as consisting of all those Laws, the origin of which can be traced neither to any Act of Parliament, nor, as the Civil and Canon Law are, to any written foreign code; and *positively*, as being that assemblage of Laws, which (although there is no written authority to be found for their enactment, yet) having their rise in indefinite antiquity, as the local or general customs of our Saxon ancestors, have been handed down from generation to generation, acquiring additional force by the tacit consent of each successive age to their authority, till at length, by the sanction of centuries, they have acquired in our own day all the binding and indestructible power of the written Statute Law.

These Laws were, in the days of the Druids, committed solely to memory; and it is said of the primitive Saxons too, 'Leges solâ memoriâ et usu retinebant.' With us at present, *the evidences* indeed of all those customs, which together make up what is called the Common Law, are reduced

into writing, and contained in the various judicial decisions, books of reports, records of the several Courts, and treatises of the learned, though the actual infancy of the laws themselves lies, as ever, lost in extreme antiquity.

In course of time, there seems little doubt, these Laws became mixed with others imported into this country by foreign invaders, as the Romans, the Danes, and the Normans; and of this mixed nature we must now consider the Common Law to be composed. In further process of time, these customs grew so various and conflicting, in several parts of the kingdom, that a digest of them all was made, first by Alfred, (and which has long been lost,) and subsequently by Edgar, and Edward the Confessor; and thus a general body of Law was compiled, governing the entire nation, and thence called the Common Law of England.

Now this body of Law, *evidenced* (as was said before) by records, judicial decisions, and reports, and *learned* through these channels by men devoting themselves to it by a long course of study, is what the Judges of our Ordinary or Common Law Courts, are called upon implicitly to administer:* they are bound by oath, to judge according to the Law of the land; and accordingly, it may be said generally, that if a Judge were to decide in any matter within the jurisdiction of Common Law according to his own private opinion, (supposing that to be contrary to the Common Law,) he

* 1 Blackstone's Commentaries, 69. [7th ed.]

would be guilty of perjury, and his decision would not be held to be Law. In other words, he must uphold with the sanction of his judicial authority that which he finds to be the Common Law of the realm, without any reference to the question, whether or not it commends itself to his own private judgment, or conscience;—*it being to be presumed, without any admissibility of evidence to the contrary,* that the Common Law is the measure of Political Justice, and the test of Social Right and Wrong.

They however, who like ourselves, are not thus restricted by their allegiance, may claim to themselves that right of independent inquiry in the matter, to which the Judicial ermine disentitles its distinguished wearers: and in order to assure ourselves of the competency of such a code to arbitrate, unchallenged, in this mighty department of human affairs, let us proceed to consider what are the Principles upon which that code is founded.

Now it is evident, that of the rules which the Common Law supplies for the actions of men, as members of the State, some do, while others do not, present themselves to us *under a moral aspect.** I mean, that some are intimately and necessarily connected with Justice considered ethically; whilst others do not contain in themselves the elements of any moral virtue, but owe all their binding force upon the subject to the circumstance of their enactment by 'the powers that be.' When enacted, but not till then, *it is a duty* to observe such; and whoever

* Hooker's Eccles. Polity, Book i. ch. 10.

violates them may, according to this view, be deemed to act unjustly;—but with regard to the other class, there is, independently of all human enactment and paramount to it, an element of moral right and wrong, with which, if the human Legislator interfere, he interferes unrighteously, and what he enacts as just, may in truth be unjust, as contravening some higher obligation, to which the agent is liable. As instances of the one class, may be mentioned the Laws regulating the descent of lands, the manner and form of acquiring and transferring property, the solemnities of contracts, the rules for expounding wills, deeds, and Acts of Parliament,* none of which touch the science of Moral Philosophy. In these Laws there is no antecedent idea of Justice to be conformed to; it is indifferent whether they, or their contraries, prevail, until such time as the supreme Civil power has determined. But how different is it with the other class of rules to which we have adverted; in order to decide upon which, whether the Common Law has legislated rightly or wrongly, resort must be had to a higher Law, viz., the Law of Nature; for with regard to matters naturally or intrinsically right or wrong, the Municipal Law acts in subordination to that superior Law.† Take for instance such maxims or first principles of the Common Law as the following:

'The Law of England is a Law of Mercy.'‡

* 1 Blackstone's Commentaries, 68.

† Ibid. 54.

‡ 'Lex Angliæ est lex misericordiæ.' 2 Institutes, p. 315.

'The Law works wrong to no one.'*

'The Law punishes a lie.'†

'The height of Right is the height of Wrong.'‡

'The Law rejoices in Equity—aims at perfection —is a rule of right.'§

'The Law is a sacred authority, which commands what is honourable, and forbids the contrary.'‖

'The Law prefers a private loss to a public evil.'¶

'The Law regards the intent of parties.' **

'The Law respecteth more a less estate by right, than a greater by wrong.'††

'The precepts of the Law are these,—live honestly — injure not a neighbour — give each his due.'‡‡

'The essence of an Injury is, that it is against a man's will.'§§

'Nothing is perfect so long as any thing remains to be done.'‖‖

* 'Lex nemini operat iniquum.' Jenkins's Centuries of Reports, p. 22.

† 'Lex punit mendacium.' Jenk. Cent. p. 15.

‡ 'Summum jus summa injuria.' Hobart's Reports, 125.

§ 'Lex equitate gaudet—appetit perfectum — est norma recti.' Jenk. Cent. 36.

‖ 'Lex est sanctio sancta, jubens honesta, et prohibens contraria.' 2 Institutes, 587.

¶ 'Lex citius vult privatum damnum, quàm publicum malum.' Coke upon Littleton, 152.

** Plowden's Reports, 140. †† Co. Litt. 6.

‡‡ 'Juris præcepta sunt hæc—honestè vivero—alterum non lædere—suum cuique tribuere.' 1 Institutes, 1. 3.

§§ 'Volenti non fit Injuria.' Plowd. 500.

‖‖ 'Nihil perfectum est, dum aliquid restat agendum.' 9 Coke's Reports, 9.

'One should be just before he is generous.'*

'Fraud ought to protect no one.'†

'To him who is never satisfied, nothing seems base.'‡

'All things are lawful, but all things are not expedient.'§

'It is the intent with which a thing is done, that gives it its character.'‖

What are all these, but so many axioms of morality, which necessarily refer us to some higher Law? We pronounce on the rectitude of these dicta, because we instinctively recognize in them an agreement with the immutable principles of Reason, and Natural Justice. Can anything be more general than these axioms? Are they not coextensive with the Laws of Nature themselves; I had almost said, of Revelation also?

It appears to me then impossible to consider the meaning of Municipal Law, (and of Common Law, as a portion of it,)—its legitimate purport and scope—without approaching the confines of Ethics. What is Political Justice? A perfect system of Municipal Laws. What is a perfect system of Municipal Laws? Rules of Civil conduct, prescribing what is 'Right,' and forbidding what is 'Wrong.' What is that 'Right,' and what is that 'Wrong'? Here indeed we are stopped, unless we look up to

* Branche's Maxims.

† 'Fraus nemini patrocinari debet.' 3 Coke, 78.

‡ 'Ei nihil turpe, cui nihil satis.' 4 Institutes, 53.

§ 'Est aliquod quod non oportet, etiamsi licet.' Hobart's Reports, 159.

‖ 'Intentio mea imponit nomen operi meo.' Hob. 123.

the source from which all human Legislation must derive its principia, namely, that 'knowledge of good and evil,' which the Great Creator implanted in us, when our first parents fell. And even that knowledge, sufficient Law though it was unto men in the duties of *private* life, was but a feeble light indeed to them, when appealed to as a guide in the abstruse problems of *Political* morality; till at length the lamp of Revelation came; and the two-fold commandment of Love to God and our Neighbour read a lesson to an admiring world, and propounded principles for all future Legislators, on which to frame their rules of moral polity for the edification of nations. 'On these two commandments hangs all the Law.' It could not therefore be, in the very nature of things, that the Common Law should have laid down any less comprehensive principles of human action than it has laid down, without doing violence to the spirit of those Laws, in subservience to which it works.* As far indeed as it prescribed rules of Civil conduct, which did not trench upon the question of morals, but were of things purely indifferent, it was, as I have said, at liberty to lay down what rules it pleased; but as soon as it stepped, in the promulgation of its ordinances, within the province of Right and Wrong, that moment it became amenable (so to speak) to a

* Human Laws are measures in respect of men whose actions they must direct: howbeit such measures they are as have also their higher rules to be measured by, which rules are two, the Law of God and the Law of Nature. Tho. Aquin. 1, 2. quæstiones, 95. art. 3.

higher jurisdiction, and embraced, or was capable of embracing, as wide a field of motives and requirements.

I wish therefore to crush the notion too generally entertained, that the Common Law had anything in its original principles narrow, or limited, which obliged it to confine itself to a small portion only of the questions of social Right and Wrong; that it was radically defective in its compass, and required any ancillary to help it in its duties;—in one word, that it ever differed from Equity. I wish to convince those, whose ears are accustomed to recognize the terms Law and Equity as words of widely distinct, not to say contradictory, import, that they in point of fact mean the same thing;—not indeed in the vocabulary of our corrupted System of Jurisprudence, but *there*, where alone their true object, scope, and nature is to be looked for, and the extent and legitimacy of their adoption into human transactions is to be measured and determined, namely, in the great dictionary of Nature,—and that men are daring to put asunder, what the Almighty willed to be indissoluble, who sever the Judicature of a country into its Legal and Equitable elements.

CHAPTER II.

ON EQUITY.

LET us now proceed to consider that most important of words, in a Judicial acceptation,—Equity.

Equity, as an attribute of the judgment, seems to have a threefold meaning.—I. In the largest signification of which it is capable, we understand by it that perfect Righteousness, in deciding upon the actions of His creatures, which characterizes, so to speak, and is a Law unto, the Divine Nature itself; that faculty, according to which we believe the moral government of the Universe to be perfectly administered by Him. 'Righteousness and *Equity* are the habitation of thy seat.' 'Thou shalt judge the world in righteousness, and the people with *Equity*.' 'The king's power loveth judgment, thou hast prepared *Equity*.' *

In these passages, it seems to denote an infallible wisdom, united to an unimpeachable goodness of

* Ps. xcvii. 2; xcviii. 10; xcix. 4.

intention, in a Ruling Intelligence; and exhibits to our minds that exemplar of Justice, which, having from eternity been self-existent in Deity, was thence derived into man, as an intimate Law of *his* Nature, and by him spontaneously apprehended as such. For those Laws which we call the Laws of Nature, are but reflections,—dim and feeble, but still reflections,—of those Eternal Laws, which God had, before time was, prescribed for himself to work by. If man was fashioned after His image, his mind, and the Laws of his mind, partook of that image also; and when by falling he attained a capacity of knowing good, by his very capacity of knowing evil, it was a capacity of knowing that self-same kind of goodness, which resided ever in, and actuated, the counsels of the Most High. His soul was thenceforth stereotyped with emanations from the Divine Intelligence,—emanations, differing from their grand Original immeasurably in intensity, but of an identical or kindred nature. For man had infringed the prerogatives of Godhead by his transgression, and thereby, in some incomprehensible way, partook of them; thenceforth, as often as he appealed to the Laws of his Nature for his guidance in moral actions, he was, in fact, appealing to Laws which represented faithfully, because made by the same Lawgiver, their 'patterns which were in the Heavens.'

II. This brings us to the second, and more limited, sense of Equity; the Equity, that is, of human Legislation, the Spirit in which all human laws should be conceived and enacted. Truly it is idle fancy to

talk or think of Justice,—which it should be the aim of all human Laws to attain to,—as an attribute distinct from Equity, or Equity from Justice.* Could we (given the greatest latitude of theory,) conceive a system of Laws constructed upon the condition, that they should be Equitable without being Just, or Just without being Equitable? Clearly no. And yet the text books of the profession, by not dwelling upon the *artificial nature* of the distinction between the principles that govern our Courts of Equity and Common Law, lend perpetual countenance to the idea, now pretty generally received, that those principles necessarily occupy separate departments in the great work of all Legislation. But is not the determination of Right and Wrong, the limitation of that which is lawful and that which is unlawful, and the discernment of truth from falsehood, the common office and province of both alike? Ought not the soundness of this or that doctrine, concerning the social duties of man, to be ascertained alike in both, by one and the same test, —namely, by its agreement with the Law of Nature, speaking to us *by* our Reason, *in* our Conscience, *through* the universal assent of Mankind, *and evidenced* by the Law of Revelation? How can it be otherwise?—for if Equity be the essence of the Law Divine, as assuredly Scripture teaches us that it is, and if it is not to be doubted that it is equally the essence of the Law of Nature, then it follows, that it ought also to be an essential ingredient in all those other Laws, the rightness or wrong-

* ταὐτὸν ἄρα δίκαιον καὶ ἐπιεικές. Arist. Ethic. Lib. v. c. 10.

ness of which is ultimately to be estimated by their accordance with, or repugnance to, the Law of Nature.

Of Equity, as applied to human legislation, there is also what may be called, as contrà-distinguished from the Equity of the *Legislator*, The Equity of the *Judge*. Practically, however, in this sense, it is an attribute of no consequence, being never exercised, in point of fact, to any considerable, or *any* extent;—no, not even where we should most expect (consistently with the principles they boast to be founded upon,) that it *should* be found—in the Courts of Equity themselves. It is an attribute, which a slavish adherence to precedents and authority has rendered as nearly as possible useless; and certainly now presents itself to us as a very different thing indeed from that Equity, of which we read in even the earlier times of our Constitution, when the Chancellor was constantly in the habit of *making precedents of new writs* for the benefit of suitors, (though the writs were proceeded on in the Common Law Courts,) as often as a case of hardship occurred, for which no precedent existed.*

III. In its third, and technical, sense Equity means the system of our Courts of Equity, with their maxims, orders, rules, and jurisdiction, as at this day settled, and in daily operation, under the auspices of the Chancellor, as their Chief Judge; a system, assuming authority in some details of socio-moral duties, the violation of which has been left without a remedy in the ordinary Courts, superintending that peculiar feature in property, known to

* 1 Bl. Comm. 50, 51.

our Juridical nomenclature as the 'Equitable interest,' (the origin and nature of which we will consider in the next chapter,) and arrogating to itself *the name* indeed, but falling far short, by the stunted application of its principles to the wants of men, of the *substance*, of Equity properly so called.

For the truth is, that Equity, in this sense, consists of its 'established rules, and fixed precepts,' as much as a Court of Common Law,—that it is as rigorous in the enforcement of all technicalities, and as much the slave of antiquity,—that it will not stir hand or foot to help a suitor, unless he bring himself within the pale of those boundaries which it has arbitrarily prescribed for itself to work in, and can cite some precedent that the aid he solicits has been accorded to others before him. "In all such cases of positive law," says Blackstone, (that is, cases which are *without* the letter of the Common Law, but *within* the necessity of some redress,) "the Courts of Equity must say with Gratian, '*Hoc quidem perquam durum est, sed ita lex scripta est.*'" And again, 'The system of the Courts of Equity is a laboured, connected system, governed by established rules, and *bound down* by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection.'* And certainly if the latter be, as it unquestionably is, a correct representation of the system of our modern Equity Jurisprudence, the picture which Aristotle first, and Grotius after him, drew of Equity,† can find no traces of its

* 2 Comm. 430, 431.

† *Ἐπανόρθωμα νόμου ᾗ ἐλλείπει διὰ τὸ καθόλου.* Ethic. Lib. v.

counterpart now-a-days, in the administrative functions of the English Chancery.

Now I beg to remind the reader, that in the very earliest times of our history, by the ancient Saxon constitution, there was only one Superior Court of Justice; by it all cases of Law involving Equity were decided, as well as cases of mere Law; and that when, upon the Conquest, the Aula Regia was the Supreme Court of Judicature, *that* took cognizance, in the same manner, of causes Equitable as well as Legal; and that even down to the reign of Edward the Third, the better opinion is, there existed no *Court* of Equity, as distinguished from a *Court* of Law, but that all cases unprovided for by the Courts of Law were, after the Chancellor had ordered new writs to be made out in the King's name, remitted to those Courts, and *there* ultimately *decided on according to Equity.*

Plain evidences these, that no better argument can be derived from remote constitutional history, in favour of the distinct Administration of Law and Equity, than from the nature of Law itself.

From the time of Edward the Third however, without dispute, the Court of Chancery existed as an independent Court of Judicature, and though its erection met with some opposition from popular prejudices, which were naturally enlisted on the side of the elder Courts of Common Law, during the power of the three Henrys, in Edward the Fourth's reign it had become firmly rooted, and its

c. 10. 'The correction of that wherein the Law by reason of its universality is deficient.' Grotius de æquitate, § 3.

influence daily exerted; though we have reason to believe that, even then, no regular Juridical system prevailed in that Court, but that the suitor found his remedy according to the private opinion of the Chancellor, then, nearly always, an Ecclesiastic. During the Chancellorships of Lords Ellesmere and Bacon, in the early part of the seventeenth century, the system grew with rapid strides; but it was not till the close of that century that, under the auspices of Lord Nottingham, it came to its full maturity, or put forth the supreme power which it now wields, in administering the Laws of Property.

How long before the establishment of the two Judicatures, as separate tribunals, that departure from their principles took place in the Ordinary Courts, which led to the Severance, we cannot with certainty discover; but there can be little doubt that the importation from abroad, in the reign of Edward the Third, of the notion of an Equitable interest in land, as distinct from the Legal dominion, hastened on that crisis; and that as often as the Equitable owner in vain made his appeal to the Judges of the land, the common sense of mankind revolted from the absurdity, and at length exacting the true measure of Justice—(for no flagrant insult of the public understanding can be tolerated for long,)—called forth Equity. That Equity, which is the soul of all Law, which had all along given substantiality to the Common Law, and which, though unacknowledged, had imparted to it all the while its chiefest vigour and ascendency—that Equity was now upreared to assume an independent

sovereignty, and to remedy, as was alleged, the defects of the elder tribunal; of which it was soon to become the successful rival and antagonist! The narrow-minded Judges would not suffer the Common Law to work out its principles; they arbitrarily curtailed them; insisted they should not obtain beyond a certain point of limitation; stopped their expansiveness, which would have spread, —nay, which could not but have spread, unless restrained,—just as the necessities of mankind extended; and created in their poor minds an imaginary barrier to the otherwise illimitable character of their system. That was the intellectual sin of the Judges. They might, without transgressing principles,—they might, without transgressing precedents, (I speak of the earliest period in which the Equitable element demanded to be heard,)—have framed their decisions upon the broadest basis of Equity; nay, they could not refrain from doing so, without doing palpable violence to their own principles. They did not so frame their decisions; they did so refrain. But what the timidity of an amenable, and responsible Bench shrunk from, surely the Omnipotence of an irresponsible Legislature might, with a stroke of the pen, have effected. Was there a single bold and patriotic voice, throughout the English House of Commons, upraised to propose that, 'whereas doubts have existed, whether Courts of Law have this or that power, therefore be it enacted, etc., that henceforth they shall have that power?' * No. The King, it

* It is true, the Commons petitioned H. 4, and H. 5, to

was *impliedly* said, might through his *Chancellor* see, that that Justice should be done, which his *Judges and Counsellors* would not do! And he saw it done: and henceforth, by degrees, grew the Courts of Equity; being in fact nothing more, historically, than tribunals which the King, as '*Parens patriæ*,' was empowered by virtue of his prerogative to uprear, when his Ordinary Courts impeded the administration of Justice, which was originally vested in them exclusively. It might have been asked, and I see no escape from the dilemma to which the question leads, 'If the King could, constitutionally, authorize his Chancellor, as *a new* Judge, to set up a substantive Jurisdiction; why could he not, as constitutionally, have authorized his *existing* Judges to have extended their old Jurisdiction, (if indeed any authority was required to extend it,) so as to embrace the cases, which he, as the Fountain of Justice, was by the fiction of the Constitution bound, at all hazards, in some sort to provide for?' The Chancellor and the old Common Law Bench were both rivulets from that one Fountain; and both, *if either*, could equally well have been made the channel for the circulation of Equitable rights.

That was the time for the struggle of principle. Had mankind then seen things as they see them now, I verily believe the Courts of Equity would

suppress the 'Subpœna.' But the introduction of the 'Subpœna' was a national blessing. What was wanted was, that it should have been either wholly wielded by the Common Law Judges, or else issued by the Chancellor, and proceeded on *at Law*.

never have been established; and with that Severance of Jurisdiction none of those Jurisprudential misfortunes would have followed, which our country now inherits. But that time passed away unheeded; and every generation that has since come and gone has pointed to the severed structures which it has found and left, and relied on them as evidences of some great necessity, without daring to touch with their fingers one of the burdens which that Severance has imposed; until it has now become, I rather fear, a sign of presumption to look back, with anything but feelings of admiration, upon the changes of that period,—changes so important, in a social point of view, that no revolution that has ever befallen our land has had such immeasurable effects, or has been felt at such a vast distance of time so keenly and unceasingly.

CHAPTER III.

ON THE LEGAL AND EQUITABLE ELEMENTS OF PROPERTY.

In order to account for the sudden exaltation of the Equitable system of Jurisprudence in England, and to show the unworthy notions of political Justice at that time entertained, it is necessary to explain the precise nature of the grand distinction between what is called the *Right* to property, (or the Equitable *interest*,) and the *Possession* of property, (or the Legal *estate*.) The mere enunciation of such a distinction may perhaps appear to the plain practical good sense of those, whose minds have not been inoculated with the jargon of an Inn of Court, to savour of a refinement too subtle to deserve serious attention: but how passing strange will they think it, that this distinction should have been the foundation of two separate and contrariant tribunals, neither of which respect, or acknowledge, the claims which prevail exclusively in the other; that Common Law should turn away when the question of *Right*

is urged upon it, and Equity spurn with disdain the *Legal* owner, and, in the teeth of the adjoining tribunal, proclaim his title a farce!

'Hinc illæ lachrymæ.'

From this diversity of operations, and conflict of interpretations, has proceeded all the cumbrous complexity—the inefficiency and inconsistency—the needless and ruinous expensiveness—of our Jurisprudential machinery. And therefore I will entreat the reader's patience, whilst I present him, as concisely as I can, with an historical sketch of the rise and progress of the divorce between these incidents of property.

The earliest trace of this division of ownership into its Legal and Equitable qualities, is to be found as far back as the times of the Roman Republic. The Laws of that great people, founded first upon the regal Constitution under the Monarchy, and next upon the twelve tables of the Decemviri, forbad certain persons (as the unmarried, the childless, and the like,) to take a legacy under any will. A testator, therefore, wishing to effect that object, named a person in his will to be his formal heir, who was under no such disability, with a request to him that he would hand over the property to, or 'to the use' of, the real objects of his bounty. This being not regarded as, strictly, a provision for those objects, and therefore not being void by Law, was yet indirectly beneficial to them through the medium of the formal heir, if he acted up to the testator's directions. In course of time however, as

might have been expected, various violations by unconscientious heirs of the moral responsibility cast upon them took place, as long as they were under no legal necessity of carrying out the testator's intentions; till at length the Imperial decrees, first of Augustus, and later, of Justinian, made that compulsory which before was optional, and imposed an obligation on the fiduciary heir to execute the trust reposed in him. Of so extremely ancient a dateis the *idea* of an *Equitable* interest in property, as contradistinguished from the *Legal* estate in it.*

But to whatever extent this division of property may have prevailed abroad, with us it was unknown by our Saxon ancestry: he who possessed the land, likewise had the Right of enjoyment; and he who was receiving ostensibly the produce and benefit of it, was also the Legal proprietor. Nor even in the zenith of the feudal system was such a distinction so much as dreamed of. It was the offspring of the reign of Edward the Third, when the notion of conveying lands to one person 'to the use of' another, was first imported from the continent by our clergy, in imitation of the Civil Law, (which, as we have seen, had for a great length of time been familiar with the expedient.) †

* But the Romans, unlike ourselves, were wise enough to see the absurdity of erecting a new Court to take cognizance of the new Equitable title of the legatee. Accordingly the same Judges, who had hitherto administered the Law, were now empowered to apply it to particular cases by the principles of Equity.

† Cruise's Digest, Title 'Use,' vol. i. p. 331.

It seems however not to have been very generally adopted at its first introduction. The clergy naturally profited most by it, for they lay under especial incapacities for purchasing lands directly to themselves, while they enjoyed every facility (the Chancellor being one of their body,) for procuring any innovation calculated for their benefit. But later, in the reigns of Henry the Sixth and Edward the Fourth, the notion of an 'use' in land, as distinct from the land itself, prevailed more generally among all ranks and conditions of men, 'by reason of the civil commotions between the Houses of Lancaster and York, to secrete their possessions, and preserve them to their issue, notwithstanding attainder.'*

For by this invention, lands instead of being, as formerly, conveyed in the course of circulation direct from the seller to the buyer, were now conveyed by him to B., (an unconcerned and indifferent person,) 'to the use of' C., (the person ultimately intended to be benefited by the land, the person who alone had given his money for it, and was in Justice entitled to it.) Now if the Common Law had carried out manfully and uprightly its own comprehensive principles, and applied to the above case, as it was bound,† an Equitable rule of interpretation, C.'s rights would have been upheld in every tribunal throughout the kingdom. But what did it do? It refused to acknowledge the Right of the undoubted proprietor, although it

* Chief Baron Gilbert on Uses, p. 3.

† 1 Bl. Comm. 61.

could not shut its eyes to the fact that he had the Right;—proceeding, forsooth, upon the unjust and senseless assumption that he must have the land, and be regarded as its owner, to whom it was first limited by express words, *were the contrary intention of the parties to the conveyance never so manifest!* So that if B. violated his duty to C. —as for instance by neglecting to render him the rents,—the Common Law Courts of the land would give C. no redress! But observe with what tenfold disadvantage this narrow-minded policy reacted upon themselves. If in the above instance they refused to uphold C.'s title, when it was his interest that it *should* be recognised by them, they could not a whit the more regard it, when it was his interest that they *should not*. If when B. had committed a fraud against C., they declined to look at the title of the latter, they must also let go unpunished any illegal acts, which C. himself might commit, as well as leave unenforced against him those burdens, to which land was subject in the hands of the terre-tenant. The ingenuity of mankind soon foresaw this result, and outran the prescience of the Ermine. The times were troublous; confiscations and attainders followed thickly on each other; and *Legal* ownerships were dangerous things. The boon, which a disregard of the Equitable title by the Judges of the land procured, was greater, in the event, than the loss;—and so conveyances and transfers quickly multiplied, which, by adopting the expedient of 'the use,' shielded the real owners from the eye

of the Law, where it would otherwise have been mercilessly directed against them, and yet admitted them, through the medium of a Court of Equity addressing its edicts to the conscience of the wrong doer, to all their substantial Civil rights. And so matters went on, for nearly 100 years; and the wondrous spectacle was exhibited to regenerate Europe of a country, whose Superior Courts of Judicature refused to adjust the rights of her subjects where that adjustment was undeniably due, and took no vengeance on those on whom they ought to have avenged themselves;—compelled to see them reaping all that they demanded, by the aid of Chancery;—yet defied as impotent to exact from them the impoverishing fruits of that doctrine of Tenures which they were expressly reared to preside over!

But, in the middle of the 16th century, men's minds first fully awoke to the glaring absurdity of such a system. Parliament crushed with a sweep of the pen the crude and Inequitable rules of Common Law; annihilated the fantastic distinction between Legal and Equitable interests; and proclaimed for the first time in the year of our Lord one thousand five hundred and thirty-six the self-evident proposition, that an 'use in land' and the land itself meant, and never could but mean, one and the very same thing,—called C. thenceforth the Legal possessor, as well as the Equitable proprietor,—upheld therefore his title, and procured for it redress, in the Common Law Courts; and at the same time subjected him to all

the Civil liabilities from which he had so long escaped under shelter of his 'use.' All things now looked brighter,—a fairer prospect of social Justice burst through the general gloom:—the Equity of Legislation had been at work, and had read the Judges of the Courts of Common Law a lesson, not soon to be forgotten, that they had been looking at the letter, and not at the spirit, of the transactions between man and man,—nay not even at the letter; for had they done so, they would have been bound to adjudge the land, in the case we have so often put, to C. equally as to B. *Both* were named in the conveyance, and every reason derived from a literal interpretation of it, which told in favour of the one, told at least with equal force in favour of the other. Surely now, it might be said, this imaginary division of ownerships is at an end for ever. We have been feeding on wind:—we have been instituting wrong *tests* for ascertaining the intention of the settlor, or rather, we have been overlooking it altogether; we have been putting bitter for sweet, and sweet for bitter. But alas! will it be credited that, within 10 years after the passing of this Act one class of cases arose,—within 21 years another,—and within 45 a third, which by the stubborn illiberality of the Judges were held to be 'without the Statute,' although it has never been doubted, that they were *within* the spirit of it! That is to say, within 50 years after the violent Legislative exertion, and Judicial Reform, which it had taken scores of years, aye centuries,

to produce, all the vices of the old system had crept back with redoubled virulence!

1. The first class of cases, in the order of time, which were wrested to disappoint the intent of the Legislature, was of the following kind. Supposing A. to be the owner of lands, and desirous to give them to J. N., after his (A.'s) death, reserving to himself a life interest in them;—it was a frequent mode of effectuating this desire, for A. to convey the lands to B., 'to the use of' himself (A.) for life, with remainder (that is, after his decease) '*that B. should take the profits of the land, and deliver them to J. N.*' The Courts of Common Law, in ascertaining the respective interests which B. and J. N. took after A.'s death, held that B. had the Legal estate, and J. N. only the Equitable interest; thereby, in effect, reverting to the analogous distinction which they had taken previously to the Statute. But if the conveyance had been 'to B., to the use of A. for life, and after his decease *that J. N. should take the profits*,' they held that J. N., and not B., took after A.'s death the Legal estate.*

Now to adjudge, in the former case, the Legal estate to B. was to violate the spirit, and even the terms, of the Statute. The simple question for the Judges was this, and could be only this; who was intended by A. to take beneficially, after his death; B. or J. N.? because *that* was the person who had the 'use' in the land;—and this 'use' the

* Cruise, Title 'Trust,' ch. i. s. 14.

Statute expressly converted into a Legal interest. There was no other division of land, except into its beneficial and non-beneficial qualities: there was no Via media to be pointed out; so that to decree B. to be the Legal owner, was in effect to declare, that he was the person intended by A. to be really interested, which was a conclusion contrary to the whole tenor of the conveyance. But the paltry reasoning urged by the Judges, in defence of their construction, (*quære* misconstruction?) was, that it was necessary to give B. the Legal estate, in order that he might be able to perform the trust of delivering over the rents to J. N.; for that when he is directed to 'deliver them,' he must needs have first received them, and this pre-supposes Legal ownership!—It is a sufficient answer to this objection, simply to deny the existence of any such necessity. The same objection might just as well have been made (which no one ever dreamed of making) in the every-day case of a conveyance, after the Statute, by A. 'to B., to the use of C.' Might it not here with equal plausibility have been argued, that B. must have the land, before he could be possessed of it for C.'s 'use?' Yet this case was at once declared to be within the Act;—why? Because the Act manifestly proceeded on the assumption that if B. was a mere formal person, named in the conveyance only to carry into effect the ulterior and substantial wish of the grantor, the interest he would have taken *but* for the Statute, should (*by*

force of the Statute) pass over him, and be transferred to C.

2. The second class of cases which was soon taken out of the operation of the Statute of 'Uses,' was accompanied with far more extensive results, for upon it mainly has been reared that modern doctrine of Trusts, which now forms the pillar of Equity Jurisprudence. It was composed of cases, in which property was conveyed, e. g., 'to A. to the use of B. to the use of C.'* Here, upon the face of the conveyance, it was evident that C., and not B., was the person intended to have the real benefit of it. But what said the Common Law—that 'perfection of Reason' according to its admirers?† 'You must look,' it said, 'no further than *B.*'s interest. You must stop short at him; his, and his only, was the 'use' meant by the Statute, and he therefore must be declared owner of the soil.' Could anything be more preposterous? What right had the Common Law to assume, that B.'s was the only 'use' meant by the Statute? The Statute had declared that *where any person* should be possessed (*seised*, as it was technically termed,) of land 'to the use' of another, that other should be adjudged the Legal, and not merely, as before, the Equitable owner. Well, to apply this to the case before us: did not B., by the very words of the conveyance, as much come within the description of a person 'seised to the use' of ano-

* Cruise, Tit. 'Trust.' Ch. 1. s. 4. et seq.

† Co. Litt. 319, b.

ther, (that other being C.,) as A. himself did? and as to the intention of the gift, what could be plainer? If I give ten shillings to A. to be handed over to B., to be handed over to C., who is the person I have it in my mind to benefit? Clearly C.; the person with whom the directions to hand over the money cease. Here then again in a marvellous manner were the principles of Justice perverted; having the power of applying those principles to meet the exigencies of the case before them, the Ministers of Justice refused to enforce that power; and B.'s liability, and C.'s title to redress, were only to be acknowledged and upheld in Equity.

3. The third class of cases consisted of those, in which the subject-matter of the conveyance was not a freehold, but only a leasehold, interest. The Statute, it was said, only contemplated lands of freehold tenure. This question at once affected a large portion of the Real property of the country; for already long terms of years had become frequent; tantamount, in point of substantial interest, to estates of inheritance; and yet in quality inferior, in contemplation of Law, to the smallest freeholds. The argument for the exclusion was this;—that the Statute having only mentioned cases, where persons were '*seised*' of lands to the 'use' of another, leasehold interests, not being objects of 'seisin,' could not be comprised; 'seisin' being the actual manual delivery of the soil to the new tenant, a solemn mode of transfer, of which the humble leaseholder was not considered worthy.

Now this argument was unsound for the following reasons.—

1. It contravened one general rule for the interpretation of Statutes,—which, if Blackstone is to be heard, ought to be observed in their exposition,—that 'Statutes against Frauds are to be liberally and beneficially expounded.'* That the Statute 'of Uses' was a Statute directed against Frauds, must be conceded from the preamble to it, which after setting forth a long catalogue of 'inventions, imaginations, and practices, whereby many inconveniences had happened, and daily did increase, among the King's subjects to their great trouble and unquietness,' enacted, 'for *the extirpating and extinguishing of all such subtle practised abuses*, that where any person or persons, &c.'

2. It was in the teeth of the words of the Statute, which in the same section expressly reached cases, where persons were '*seised of* RENTS to the use of' another. † Now the expression 'seisin' was equally inapplicable, (according to its strict legal signification) to rents, as to terms of years; for Blackstone teaches us, that all 'incorporeal hereditaments' (as they were called, *and of which rents were one*, ‡) 'are mere rights issuing out of things corporate,' (i. e. capable of being handled,) 'and are not themselves capable of being shewn to the eye, nor of being delivered into bodily possession.' Nevertheless it was admitted, and rightly so, to be

* 1 Comm. 88.

† 27 H. viii. c. 10, s. 1. ‡ 2 Comm. 20, 21.

clear that the Legislature intended to comprise 'rents,' *because it had expressed them*, notwithstanding that it had applied to them a term, ('seisin,') not strictly correct in point of Law. But if an incorrect application of a term did not, in the one case, exempt from the Statute things incapable of 'seisin,' why should it in the other?

3. With an inconsistency scarcely conceivable, the Judges DID *allow the Statute to operate*, in some measure, and to a certain degree, even upon leasehold interests; as for instance, upon such as were created, or carved, *for the first time* (*de novo*, as it was called,) out of a freehold; while at the same moment they denied its operation to the cases we have already adverted to, where *existing* leaseholds were transmitted. Thus, to state the difference more plainly; if A. having lands of freehold tenure conveyed them to B. 'to the use' of C. for 1000 years, C. became both the Legal and Equitable owner. But if C. (thus possessed, be it observed, of a leasehold interest) subsequently conveyed it to D. 'to the use' of E., then D. took the Legal, and E. only the Equitable interest. *

I have trespassed thus largely, in the threshold as it were of our inquiry, upon the patience of the reader, partly because it is impossible, without leisurely tracing the historical derivation and fluctuations of the doctrine of 'Uses,' to understand the worthlessness of the distinction now so thoroughly established between those Rights of the

* 1 Hayes' Conveyancing, 122.

subject, which a Court of Common Law will, and those which it will not, entertain; and partly because the cases we have been just considering of exceptions from the Statute of Uses form the groundwork of the amazing business of Chancery at the present day. All the heads of Chancery Jurisdiction (some of which we propose to present to the reader in review,) radiate from this point. This sacred character of Trustee is stamped upon all the relations between man and man, with which Equity has any concern. Does the particular case come under the denomination of 'Fraud,' it does so, because of the presupposed relation of *confidence* between the parties. Had they been independent of all special obligations to each other, and strangers in the contemplation of Equity, there might have been an *injury* done and suffered, but it would not have amounted to 'Fraud.' 'Fraud,' as applied to the Laws of Real property, implies some previous confidence reposed, and some previous confidence abused.

Again, all questions relating to Agreements, Sales, Executorships, Accounts, and Partnership transactions, in fact hinge upon, and are cognizable by Equity, because they involve, the same cardinal doctrine. They present us necessarily with the idea of a party *trusting*, and a party *entrusted:* even the statement of a case of mere Mistake, Accident, or Surprise, betrays the same leading idea; Chancery immediately views the party, who would be benefited by taking the undue advantage, through the medium of its one darling theory of 'Trusts,'

and fixes him with a temporary Trusteeship. Trusts pursue us in every page of Equity lore. They haunt us at every turn. They are the watchword of Queen's Counsel. They dwell on the lips of the Chancery Bar. They are whispered from the oracles of the Bench. They are muttered in Westminster Hall. They are echoed from Lincoln's Inn. They are the Rubicon between Law and Equity. *

* I may here observe, once for all, that the words 'Law' and 'Equity' are, for the sake of brevity, used in the following pages in their technical sense to denote, respectively, '*the Courts of Common Law*,' and '*the Court of Chancery*;' except where the context requires them to be understood in their larger significations.

CHAPTER IV.

ILLUSTRATIONS OF THE ANOMALIES OF SEVERANCE.

HAVING thus far attempted to show, from a consideration of the nature and principles of Municipal Law itself, that no *essential* difference exists between Law and Equity, but that the distinction is arbitrary and refined, the creature of human ingenuity, and therefore by human enactment capable and allowable of being set aside ; * and having taken a review of the origin and progress of the Legal and Equitable elements in property, it remains for me next to illustrate the injurious mode in which this Severance of Jurisprudence operates ; for if no considerable practical evils result from it, but the System, however fictitious and artificial, works well, I shall have laid no sufficient ground for pressing my advocacy of a fusion of its rival branches. But if, on the contrary, it shall appear that manifold grievances, and manifest obstructions to Justice, are n daily course of accumulation in consequence of

* 'Eodem modo, quo quid constituitur, eodem modo dissolvitur.' 6 Coke's Reports, 53.

that partition, my part is done; and the responsibility for those abuses will thenceforth lie at the door of those, who having dwelt on them, and being persuaded of them, lose a moment in uplifting the tongue of eloquence, and clenching the strong arm of rank and influence which they possess, towards their discomfiture and demolition.

I know no other way of presenting the reader with the object of the present chapter, than by leading him somewhat tediously into the mazes of professional details, from which I would willingly have relieved him. But the importance of the whole question seems to me so impossible to be overrated, and it so nearly affects, as a matter of personal concern, all classes of mankind, that I descend to these particulars with the less hesitation.

The first class of instances then, which I propose to adduce in support of my original proposition, that the Ordinary Courts of Justice, as at present constituted, are NATIONAL INSTRUMENTS OF INJUSTICE, shall consist of those which connect themselves with the Equitable doctrine of Injunctions. The essence of an Injunction is, that it is a *preventive* remedy, applied not so much to redress past, as to guard against future, injuries. It is an engine wielded by Chancery alone, and is an order issuing from that Court, commanding the party enjoined to abstain from doing, and suffering to be done by those whom he can control, certain specific acts. Upon the history of Injunctions I shall only remark, that they are to be traced back satisfactorily as far as the beginning of the reign of Henry the

Seventh; and that in that of James the First a warm contest ensued between the Courts of Law and Equity, as to whether the latter could suspend by Injunction proceedings in the former; which ending in favour of Equity, her power to interfere has ever since been undisputedly acquiesced in.

The Injunctions to which I wish here especially to refer, are those in which the extraordinary interposition of Equity is resorted to, in order to repress the UNJUST exercise which a party would otherwise be enabled to make of his LEGAL advantages! Strange words these! but true: and if true, conclusive, one would think, (without more) that Law and Justice are contrary the one to the other. Thus the Courts of Common Law have never scrupled to *legalize unjust defences!* As, for example,* if A., the devisee of land, brings an action to recover it against C., (the heir of the devisor,) who is unjustly in possession, C. may successfully defeat the action by showing a leasehold interest in the land vested in D., notwithstanding that it may have been so vested in him expressly as a trustee for the rightful owner, and to protect his title! In other words, because A. has no *present* '*Legal estate*,' that being in D, the Courts of Common Law will close their doors against him, for C. will immediately plead D.'s 'outstanding term,' (as it is called,) and it will be apparent that he ought not to be disturbed in his possession by a tribunal which avows

* Lord Red. 134. 2. (Mr. Justice) Story's Equity Jurisprudence, 169.

cognizance only of a Legal Title; and that, it has been shown, is at all events not in A. How then is A. to effect his object? Why, he must institute an entirely new suit* in Equity; and procure an Injunction to restrain C. from making use of the defence he would otherwise be entitled to set up; to effect, in fact, a removal of D.'s leasehold interest, and to treat the question as if there were no such impediment in the way of a fair hearing. Fortified with the Injunction, A. now returns to Law: C. is inhibited from sheltering himself under the plea of D.'s Legal tenancy, and the land is awarded to A.

Now mark the amazing absurdity of this state of things. A. (and the cases we have put have been of frequent occurrence) could not *proffer his claim originally in Equity.* His remedy, his only acknowledged remedy, was *at Law.* He was compelled to resort there, *because that was the only tribunal appointed to try the facts in dispute* between the parties. And yet it withheld the very means indispensable for a fair investigation of the subject. Nay, if not controlled by Equity, it would have decided in the very teeth of the facts, and decreed the land to C! The suitor, baffled and buffeted from Court to Court, is at first denied a full hearing in that one in which he is obliged to commence his suit, and, finally, by the help of an extrinsic tribunal, forces the original Court to hear the case, *contrary to its own rules, and to retract its previous denial!*

* 1 Simon and Stuart's Reports, 419, 420.

I have instanced the above class of cases, notwithstanding the alteration which the Legislature has recently effected* with reference to them; partly, because this alteration being, as it affects the point we are considering, in its remedial effects prospective only, has left untouched cases existing at the date of the Act, and therefore will not operate fully on titles for many years to come; and partly, because the foregoing instances will ever stand out as witnesses, even when the Act shall have come into full operation, of the anomalous mode in which the Courts of Common Law have been suffered, up to so very recent a period, unjustly to work out their principles, and must tend to diminish both our confidence in them as the bulwarks of our liberties, and our reluctance to protest against their claim to inviolability. Moreover, the very enactment of such a Statute, opposed as it is to the time-hallowed spirit of the Common Law, and destructive of one of its peculiar and favourite dogmas, shows more clearly than words can express the arrival of a great Jurisprudential crisis, demanding, like that Spiritual Revolution which of old expelled the Pagan idols from the Altars they had polluted, the substitution

* 8 & 9 Vict. c. 112. 'An Act to render the assignment of satisfied terms unnecessary.' The prospective character of the Act will be defended, I presume, on the ground of the protection due to existing Rights. If the advantages gained by the assignment of terms were *Rights*, in the true sense of the word, I grant that the Act could not have been retrospective without violating a first principle of Natural Justice: but they were *obstructions to Rights, as in fact the Act admits.*

in the sanctuary of Justice of a nobler and purer discipline!

Again, a man may, by *Legal* process, be put and confirmed in possession of property, to which, as between himself and the party disputing his claim, he has no sort of right! Thus, a creditor who has never looked to the lands of his debtor as a security, may be receiving their rents and profits by virtue of a Judgment obtained at Law, to the exclusion of a more deserving claimant, who has purchased the lands, and paid down his money, but whose title is disregarded at Law, because (for instance) it falls short of an absolute Legal ownership;* a circumstance which Equity at once declares immaterial, and will not suffer to clog his road in her Courts towards substantial retribution: an Injunction issues; the Judgment creditor is restrained; and the fruits of the land now follow their rightful owner.

Again, if a deceased person's estate is being wound up in Equity, at the suit of one of the creditors, and a Decree has been obtained for administering the assets agreeably to the rights of all parties interested in them; a creditor, whose security is entitled to preference *at Law*, may, until enjoined by Equity, still sue the executor at Law for his separate debt,

* 3 (Sir E.) Sugden's Vendors and Purchasers, 429. To this head may be referred the cases in which Equity supplies defective executions of powers, and conveyances of copyholds, (2 Sugden on Powers, 96. Scriven on Copyholds, 258,) where a technical informality is *fatal at Law* to a title which is eventually *upheld in Equity!*

to the disappointment of the other creditors. And the reason, the only reason, given for this wilful blindness of the Ordinary Courts to the public, notorious, decisions of the Extraordinary Court is, that they do not take notice of a Decree in Equity.* Well, if they do not regard a *Decree*, they will tremble before the all-imperious *Injunction;* for the Executor, or a creditor, steps across the threshold of Equity, states and proves his case there, and retires with an Order to restrain the litigious plaintiff at Law from proceeding any further.† It is really astonishing that there should have been found those, who in‡ their zeal to make out a consistency and co-ordinateness of operation between the two Tribunals, have distinguished between an Order directing the party enjoined not to proceed in the Ordinary Courts, and one directing those Courts themselves not to entertain the matter; and who urge, that an inhibition to the supplicant is no interference with the independence and majesty of the Tribunal which he supplicates! For is it not, in substance, equally a check to the power and influence of any Court, to prevent suitors from having access to it, as it would be to prevent that Court, in so many words, from listening to the demands of those suitors?

Again,§ a Court of Law will give a verdict for the plaintiff in an action on a Bill of Exchange, or

* 2 Story's Eq. Jur. 156.

† Williams on Executors, 1504.

‡ 2 Story's Eq. Jur. 149.

§ 2 Story's Eq. Jur. 171. 1 Maddock's Chancery, 415.

other negotiable security, although it has been obtained from the defendant under circumstances so grossly Inequitable, as to render it impossible, even according to our perverted system of Jurisprudence, that the transaction should ultimately stand. But *Law* will not prohibit the negotiation of the Bill. *Law* will not direct its cancellation. Rather *Law* will enforce its payment. What then shall the defendant do? He hies him from the regions of Special Pleading to the haunts of the Equity draughtsman: leaves the chrysanthimum terraces of the Temple for the joyless garden of New Square: exchanges an attitude of defence for a posture of defiance, and is metamorphosed into a plaintiff in Equity. The plot now thickens around him. He stands pledged to a double law-suit. And certainly during the interval which must elapse before his 'Bill is on the file,' and his 'Motion brought on,' he will continue in no very enviable state of suspense; and even when he goes on his way rejoicing with the Order for an Injunction in his pocket, there remains a sorer battle yet for him to wage, when his opponent shall have roused himself to his full strength, and the effort to 'dissolve' comes on. But we will suppose that he is victorious throughout; that the whole expense of the Equity campaign has to be defrayed by his adversary, and that 'at the Hearing' he has even made his Injunction 'perpetual.'

Yet let us pause to consider his career. He has run great hazards. He has had miraculous escapes. He has been put to gratuitous suffering. A single false step would have ruined him. He has had a

twofold litigation. He has had to traverse the quicksands of Equity *in addition to* the quagmires of Law. And all for what? For what, indeed—but to satisfy the senseless requirements of a Legal tyranny, and to add one more to the train of unwilling victims, whose *examples* will be hereafter wrested into as many *reasons* against the annihilation of these abuses?

Again, suppose a party proceeds at law to recover an annuity, or any other benefit, which has been granted to him by an instrument properly executed in all outward respects, but which was in truth procured 'without consideration,' (as it is termed) that is, without a sufficient reason moving the grantors to make the grant; or suppose the instrument to have been framed contrary to the intention of the parties to it, by fraud, mistake, or accident; will the defendant be allowed, in a Court of Law, to avail himself of any one of these circumstances, which go to make up the very essence of his case? No.* To Equity he must resort: there, but there only, he may reveal the fact that he never received a shilling for the annuity, or that the instrument was drawn up in direct contravention of the agreement, but *Law* will never admit these explanations, however true and necessary for a righteous judgment, in opposition to so strong a

* Lord Red. 128, 129. 1 Story's Eq. Jur. 349. 2 Bl. Comm. 446. Morrison *v.* Wilkins, before V. C. Wigram, Dec. 1847, which was the case of a policy alleged to have been assigned with a fraudulent intent, where the V. C., under the circumstances, allowed the plaintiff at Law to proceed with his action-

counteracting circumstance as a formally executed parchment!

But is this a tribunal fit to arbitrate on the Real Property of a country? Is this meting out Justice to a people? Is this a policy commensurate with the wants of an enlightened nation? It is no reply to say, 'There is Equity open to you: your wants may be *there* supplied. Flee thither, and no *eventual* injustice ensues.' I answer, that what Englishmen have a right to require, is not an indirect, but a direct, dispensation of Justice; not a tardily eked out, but a spontaneously accorded measure of right; not a twofold, but (if there must be any) a single-handed and decisive litigation. I answer, that the birthrights of the people should be administered in as liberal, as uniform, as costless, as intelligible, and as speedy a manner as possible, and that no narrow rules, no diversities of practice, no hair-breadth subtilties, no nice balancings of Jurisdiction, should interpose between them and the simple avenging of their wrongs. The unfortunate suitors whose case we have been just considering, had a right to expect, that if they had any legitimate ground of defence, they should be allowed to adduce it before, and to have it duly weighed by, that self-same tribunal, on that self-same arena, which their adversaries had summoned them to, and selected for the contest!

Again, if a Trustee, in manifest violation of his trust, or a Landlord, in contravention of his agreement, ousts of the estate those for whom he is trustee, in the first case, or the tenant with whom

he has contracted for a lease, in the second, he may do so with impunity at law.*

Again, if one is sued at Law, having a perfectly good defence to the claim made against him, but one the facts of which rest exclusively in the knowledge or power of the plaintiff, it is clear that the discovery of those facts is essential to the right decision of the action. Will Law help the defendant to that discovery? No.† Does it regard the absence of the discovery as material? No. Does it scruple to award to the plaintiff his claim, protest the defendant never so truly of the Justice of his defence? No. What then? It will proceed to try the cause with the partial materials for adjudication it possesses! It will decree the foulest injustice, as far as it can, unless controlled! But the defendant flies to Chancery—'files his Bill'—ransacks the adversary's conscience on oath—procures a stay of the Legal proceedings by the plenipotentiary Injunction, and at length returning to Law, satisfactorily establishes the invalidity of the plaintiff's title to redress! But where is the reasonableness or fairness of the System, which enables a man to bring another into a Court of Justice, without being himself responsible for any information he may possess material to the inquiry, and *without being liable to disclose those circumstances, which would instantly disentitle* him to a verdict?

* 2 Story's Eq. Jur. 152.

† Lord Red. 53. Wigram on Points in 'Discovery.' 2 Story's Eq. Jur. c. xli.

Again,* supposing C. to be surety for A., in a bond to B. A., unknown to C., and without his consent, enters into a fresh verbal contract with B. to postpone the payment of the money. B. may still sue C. at Law for the amount, though Equity, when appealed to, will interdict him. The reason given for this egregious piece of Injustice is, that a *verbal* agreement cannot be pleaded to discharge an instrument (like the bond) under seal; that the subsequent agreement is not to be looked at at all; but that things are to be judged of, *in direct contravention to the real facts*, as if they were, at the time of bringing the action, in exactly the same state, as when C. stood surety. Now mark: C. had received a wrong, and it was this: the agreement which implicated him was varied behind his back—'Time had' (as the commercial phrase is,) 'been given' to A.; B. had promised to forbear proceedings against A. during the extra time allowed by the variation, and the term of C.'s responsibility was thereby prolonged without his assent; therefore he was clearly entitled to be quit of the transaction;—but he still remains responsible at Law; and can only purge himself of that responsibility by the extraordinary interposition of another Court!

Now if it is to be the Law of the land, that parol agreements shall not vary written ones; or, that a

* Smith's Mercantile Law, 424. 1 Story's Eq. Jur. 264, and cases cited in n. 1. One of the latest cases in Equity on this subject is Bell *v.* Dunmore, before Lord Langdale, April, 1847.

man shall be confirmed in an unrighteous possession; or that he shall keep back evidence which would exculpate his opponent; or that transactions tainted with extortion shall stand—let it be so. Men may then obey, though they cannot respect it: but when, as now, doctrines are in one branch of the Judicature acknowledged as Law, which in the adjoining one, are set at nought, they can neither obey, nor respect it.—*The only effect of the present state of things*—and this is most worthy of observation—*is to make the road to Justice more circuitous;* and to *wilfully* interpose a temporary barrier in the way of its suitors:—it does not debar them from obtaining that indemnity which, according to the Common Law view of their Rights, they ought not to obtain, but only renders the mode of their obtaining it, more intricate, more tedious, and more costly.

Other cases too numerous to be cited might be easily added to the above. But these alone will suffice to convince us of the utter incompetency of the Ordinary Courts of Law to administer true Justice;—of the circuity of redress which the sturdy maintenance of their rules occasions;—of the practical nugatoriness of those rules;—and of their direct tendency, as far as they go, to frustrate the eventual success of the honest and just claimant.

CHAPTER V.

FURTHER ILLUSTRATIONS.

We have hitherto been confining our view to cases, in which *Equity* has been resorted to by the suitor to obtain that redress, which *Law* in the first instance had refused him; and in which, as a wise and beneficent mistress, she effectually and unhesitatingly assists him. We must now however address ourselves to another very important class of cases, the converse of the former, viz., those in which the suitor comes *originally* before Equity for redress, but is by her remitted to Law, not because she denies his right to any redress at all,—far from it, — nor because she cannot take cognizance of the subject matter of the particular claim, without transgressing her principles; but because it is one, to which the jurisdiction of the Ordinary Courts happens to extend, and which therefore she hands over to them for adjudication!

The reader must here be informed, that there is an immense mass of cases, daily coming before the Equity Courts, in which the real merits of the contending parties are never touched; those cases; I mean, which have not yet reached the stage, in

which the Rights of the litigants come to be discussed; cases,—in which the whole argument turns upon preliminary points, matters of pleading, questions as to whether this or that Court has jurisdiction in the suit, and so forth; cases,—off which, it may be said, the rind and bark have not yet been stripped; and which are, at an enormous cost, at intervals of weeks or months, dragging their slow lengths along, without involving anything more at each successive hearing, than the discussion of dry details of practice. Now it is not here for an instant pretended, that cases can proceed in any Court, without a certain observance of prescribed technicalities;—every system has, and ever will have, its formularies; and no code of Laws can be conceived, which shall not be incrusted with a ceremonial fence-work; but what is insisted on is this, *that anything which procrastinates and complicates an arrival at the merits is vicious;* and that any abridgment, which can with safety be made, of the purely formal part of Law, as contrasted with its substance and vitality, ought to be made; and that the separate Administration of Law and Equity multiplies beyond all telling that procrastination and complexity, and is its chiefest cause. So do not think, gentle reader, when you take up the newspaper in your breakfast parlour, and your eye rests, as you throw yourself into an easy arm-chair to peruse its columns, on the Report of (perhaps) a long expected and anxious cause, that it contains an adjudication, or even an approach to an adjudication, of it. It is

merely one of the hundred occasions, in which, before you hear the last of it, Counsel and Solicitors will be tearing it to pieces, and helping themselves to the lion's share of your victimized property. It is merely the resolution, probably not even that, but an adjourned debate, of a by-question, infinitely remote from the real pinch of the case, the true and only point at issue. It is merely one of those strong spokes of delay, which the Severance of Law and Equity has thrust in the way of a speedy and straightforward decision. Thus, the best part of a week you may see the contest going on, 'on Demurrer,' as it is termed; that is, upon the solicary question, (for example,) whether your complaint should have been lodged in Equity, or at Law. And perhaps at the end of three or four days' painful recurrence to the pages of the 'Times,' or 'Herald,' you will fix your glance on the astounding and fatal words, 'Demurrer allowed.' 'Demurrer allowed!' you ejaculate, as you ring your bell, and order your horses round for a hot trot to your Solicitor's office. 'What can that be? does it mean that I have no case; that I am repelled in a Court of Justice? I, whose right is so manifest; who have been so deeply and undeniably injured, who, if ever man had, have a claim to be heard and avenged?' Not so, my friend—your case undoubtedly is righteous, and you may yet live, if you are not a very old man, to hear that it has prospered at length;—but your Counsel chose the wrong Court to proffer it in. That is all that 'Demurrer allowed' means. He

chose Equity, when he ought to have chosen Law. And this intelligence, no doubt, will turn your despair into wrath; and if you are not of an exceedingly candid and forgiving temper, you will wreak curses loud and fierce on your unhappy Advocate and abuse him for his unskilfulness. Yet stay once more. Abuse not *him*;—abuse, rather, our divorced Judicature,—our Law divided against our Equity, and our Equity against our Law. Counsel, like all other men, are fallible,—most fallible,—and if the differences between Law and Equity be what I have stated them to be, man's unjustifiable invention only, and contrary to the nature of things; O! wonder not, if he has fused those principles, which in very truth are one, though the extravagance of our ancestors has called them two. Blame him not, for having put Law for Equity, or Equity for Law, if the great originals which they claim to embody be in truth the same. Blame him not, if he has overlooked the inappreciable differences of Jurisdiction, which the subtilty of man, in defiance of the Law of Nature, has assigned as their respective provinces.

The recent case of* Mozley against Alston, which has attracted much attention, both in and out of the profession, may here be mentioned, as affording as striking an instance as is possible of that particular class of cases we have just been considering, and of the evils resulting from a Severance of Jurisdictions. That was a case in which some shareholders in a Railway Company brought

* April, 1847.

their suit in Equity against the directors, alleging that the defendants had been improperly chosen directors, and praying that they might be enjoined from retaining and using the Company's seal, and from doing all other acts incidental to the office of a director. *The simple point at issue on the merits* was, which of two parties was rightly exercising a corporate office. The defendants however '*Demurred*' to the suit, on the ground, amongst others, that the point was not one which Equity could determine, but was solely cognizable at Law. The Vice-Chancellor of England on solemn argument overruled the Demurrer, thereby establishing the validity of the plaintiff's '*locus standi*' in Equity, who, on the strength of his Honour's decision, applied for, and obtained, the required Injunction. The defendants then appealed to the Chancellor, who reversed the order of the Court below, thereby putting an end to all further proceedings in Equity, and remitting the plaintiffs to Law, for whatever remedy they might be entitled to.

The Chancellor in his Judgment said, that three reasons had brought his mind to a conclusion adverse to the plaintiffs. Firstly (which was a completely technical one, and if standing alone, would not have been fatal to them,) that they had not sufficiently averred, that they were suing on behalf of the body of general shareholders, who therefore ought to have been made parties to the suit. Secondly, that the plaintiffs had not asked any redress *beyond* the Injunction; the consequence of which would be, that if the Court were to grant the Injunction, it would in effect be putting an

end to the Company altogether, which as it was a Corporation, the Court had no power to do. Thirdly (*which is the point material to us here, and chiefly weighed with his Lordship,*) *that a Court of Equity had not power to try the question, which of two parties had the Right to an office in a Corporation.*

Now this cause, — never having proceeded, be it observed, further than the argument on 'Demurrer,'—consumed the best part of a month in two branches of the Court; several of the most eminent Counsel were specially retained at enormous fees; an incredible amount of costs was incurred; (which were all decreed to be borne by the plaintiffs;) and after all, it went off and vanished for ever from the floor of Chancery, *owing to the two-faced nature of our Judicature, and to no other cause whatever, without the real question of Right as between the parties, ever coming under the cognizance of the Court, or being once discussed or even adverted to.*

But to proceed to instances where the relative rights of the parties, do come fairly before the Courts, and the case is heard '*on its merits.*' And foremost amongst those of daily occurrence coming within this description, may perhaps be mentioned cases of 'Patents.' A Patent, every one knows, is an exclusive privilege vested in a man by the Queen's letters patent, to receive for a given period the benefits resulting from the sale or publication of any new invention, in trade or manufacture, of his own genius, industry, or ingenuity; of course he may assign this benefit to another, for what is called in

Law a 'good consideration,' that is, for money, or money's worth. The person so purchasing the benefit, is called the assignee, and after purchase is to all intents and purposes viewed in the same light as the original patentee himself. Now if the 'Patent be infringed,' that is, if an invention be set up by a stranger, so closely resembling that for which the Patent was granted, as to prejudice its sale, and being in fact an imitation of it, the patentee or assignee (as the case may be), clearly suffers a wrong, and brings his suit accordingly. If his object be to prevent, in the most effectual manner, the circulation of the injurious invention, he naturally lodges his complaint in Equity,* and applies for an Injunction to prevent prospective damage, as well as for a decree to make the pirate account for the profits he has already unwarrantably made. In the first instance, he may obtain his Injunction *ex parte*, without giving the opposite party notice of his intended application; that is, he may, on the strength of his own case, obtain a temporary redress. The other side then moves to 'dissolve the Injunction,' and upon this motion, the argument '*on the merits*' comes on; the one party adducing all the evidence in his power to disprove, the other to prove, the fact of the 'infringement.' If the case be made out in favour of the plaintiff, Equity will itself decide the merits, and enjoin the defendant *perpetually* if, on the other hand, the defendant clearly proves it to be no 'infringement,' as Equity would not on the original application of the plaintiff, have granted him an

* 2 Story's Eq. Jur. 192, Lord Red. 138.

Injunction *at all*, if both sides of the question had then been disclosed, so now she will decline to *continue* it; but in a large majority of cases, the question of 'infringement,' is not a clear case;* and then the Court remits the plaintiff to Law, tells him to see whether he can there make out his title as against the defendant; and if he can, then to come back to Equity, and she will grant him the required aid;—and any injury in the meanwhile which may be suffered by the plaintiff, before he can have the matter adjudged at Law, is thought to be obviated, by shielding him with an interim Injunction, during the Legal proceedings, *if the preponderance of evidence* be in his favour; or if not, by at least directing the defendant to keep an account of the profits he may be making by the alleged piracy. The plaintiff's invention may itself have been an imitation, and lack that character of originality which warrants protection by patent; or the defendant's invention may be distinct from, or a *bonâ fide* improvement on, the plaintiff's, though *apparently* a mere imitation;—or the plaintiff's right, though once good, may now be gone, e. g. by efluxion of time, or by subsequent arrangement with the defendant. In short, various are the questions of fact, which must be thoroughly sifted before the Court can undertake to award finally between the claimants; and the investigation of these facts she tenders to the Ordinary Courts. So that the whole question has

* One of the latest cases on this subject is Block *v.* M'Michael, before Sir L. Shadwell, Dec. 1847.

to be opened afresh in a new suit, in a distinct forum !

Sitting, that is to say, as a Court of Justice, to weigh well the actions of mankind ;—nay, professing to take into the scale their very motives ; armed too, as she boasts, with an omnipotent authority to search into the hidden reasons of things ; and practically employing that authority, in a vast number of daily instances, to test facts, detect pretences, and sever truth from fiction ;—Equity now refuses her aid, because questions of fact are before her ! At one time she lends her capricious ear to the fullest extent to the unravelling of doubtful claims, at another she deafens it to the calls of the most palpable necessities ! Can she, with any show of reason, allege that she abandons a case to Law, because debateable masses of fact can be best decided there ? And yet that is the only reason which she deigns to render for the abandonment ! Why, every day, and every hour of every day, that Courts of Equity hold their sittings, they are determining abstruse questions of fact ;—they don't scruple so to do,—they can't refuse so to do, where the cases involving those questions, are, as they call it, within their *exclusive* Jurisdiction,—because, if they did, no other Court would determine them, and the wrong must go unredressed. But because they choose to consider, that in the Law of ' Patents' they assume a *concurrent* Jurisdiction with the Ordinary Courts, they discard the present settlement of those rights, the *partial protection of which they have*, it may be, *already undertaken, and the entire*

vindication of which they will perhaps be eventually called on to superintend! So that, to point the anomaly, the very Court which yesterday repelled the patentee from its doors, for the better trial elsewhere of an *isolated point* of fact, will be to-morrow engaged in dissecting *huge volumes of facts;* and the very Court which has usurped the Jurisdiction of other Courts, because her machinery works out facts better than theirs,* now returns a cause upon those Courts, because facts have to be worked out!

Equity not competent to deal with facts! Why, every month of the year, hundreds of thousands of facts are travelling on in their luggage vans, through the dusk rooms of those slow waggoners, the Chancery Masters—her own officers and offspring—by her especial order and command!

So closely akin to the foregoing are Copyright cases, (and cases analogous to Copyright,) that I shall not trouble the reader with any detailed account of them; dismissing them with this single remark, that these heads of cases form a considerable portion of Equity business, and stand prominently out, as representing the arbitrary mode, in which she denies relief where she admits it to be due, and hies back the suitor from the lists which he has chosen to the narrower floor of the Common Law.†

Again,‡ a creditor may so unite his claims, as to

* This is the reason invariably given for the Jurisdiction of Equity in matters of 'Account.'

† Lord Red. 138, n. x.

‡ 1 Story's Eq. Jur. 330, 331. 2 Vesey's Reports, 573.

'squeeze out' (according to the pithy technical phrase) a prior creditor with a better Right. Thus, if A. mortgages first to B., then to C., then to D.; and D., in ignorance of C.'s mortgage, buys in B.'s, he can enforce payment of it, *and also of his own*, before C. is paid at all! Now Equity acknowledges the injustice of this doctrine: 'perhaps *it might be* going a good way at first,' says a great Equity Judge: (that is, I apprehend, *it was* 'going a good way at first;') but because D. has got in B's *Legal* interest, (which, be it observed, confers no *Right*,) his *Equitable* Rght has priority given to it over C.'s! This we are told, by the same Judge, is a necessary result of the separate Administration of Law and Equity: 'but if it had happened in any other country, it never could have been a question.' And so it is a necessary result of the existence of a *Legal* interest as distinct from the *Equitable* Right, and of the 'separate Administration of Law and Equity,' that a first principle of Natural Justice is to be trampled under foot, which is this, that an innocent creditor lending his money on an estate burdened at the time with only one other debt, (and probably lending it from that very circumstance,) *ought to be paid before a third debt subsequently contracted!*

The next class of cases that I shall mention, in which Equity plays truant to her own principles, are those relating to the doctrine of 'Specific Performance.' What that doctrine is, I shall very briefly state. Taking a conscientious view of the relation between buyer and seller, contractor and

contractee, Equity awards to a party from whom that, for which he has agreed, is withheld, the possession of the *very thing* withheld; her favourite maxim being, that '*that which is agreed to be done, is done.*' Courts of Common Law indeed as well arrive sometimes at the same result, though by a different doctrine.—They too restore possession of the very thing which is unlawfully taken from its lawful owner, but then he must have been, before deprivation, actual Legal owner; that is, (following the distinction mentioned in a former chapter,) he must have had not only the Right, but also the Possession;—he must have been clothed with a complete Legal, as well as Equitable, ownership. But, in Equity, in accordance with the spirit of the above maxim, it is enough if *one* condition of ownership have been fulfilled, namely, the acquisition *of the Right*, although no *transfer of the Property* has been yet effected; and accordingly many cases occur, as may readily be conceived, in which the interposition of Equity will be available, but not of Law. Hence, if A. agrees with B. to sell him an acre of land, and fails to perform his agreement, B. may compel him to perform it *specifically*; that is, to sell him the very acre;—so, if A. had agreed to lease lands to B.;—or to renew an existing lease;*—or not to remove crops off the land;† —or not to set up a trade within a given distance;‡ or not to cut down ornamental timber-trees,§ (and

* 3 Atkyns' Reports, 83.

† Eden on Injunctions, c. 2, p. 27.

‡ 1 Sim. and Stu., 607. § Maddock's Chancery, 141.

so in a multitude of other such like cases,) and had failed in his promise, he would have been obliged, in Equity, literally to fulfil his engagement. So far so good. It undoubtedly was just, that B. should have what he stipulated for, and was in unison with the grand Equitable doctrine above mentioned.

But supposing the contract to have been, that A. should sell to B. 100 tons of iron, or quarters of wheat, or a sum of stock,* or that A. should repair,† or (perhaps, that he should build)‡ a house, and A. fails; B. shall not have any assistance in Equity, but may console himself with what damages he may prevail upon Law to award him, as a compensation for the breach of faith. Yet in what respect, in the cases supposed, do B.'s equities differ? Is there any less reason why he should have the *very* iron, or the *very* wheat, than the very acre? In both cases, or in neither, let him have a money recompense:—let the Law be uniform and single, now it is multiform and complex. Either let Law follow Equity, and be empowered to give him the very thing; or let Equity yield to Law, and assess damages in both. But now they are plainly contradictory to one another, Law calling money the equivalent, Equity land. It is indeed said, that if B. contracted with A. for 100 tons of iron, he contracts not for *these or those particular* tons; and that goods are so evanescent in

* 3 Atkyns, 384.

† According to Lord Hardwicke, 3 Atk., 515.

‡ According to Lord Thurlow, 1 Ves. Jr. 235.

their nature, it is impossible to identify the exact quantity for which he has contracted; whereas, if he contract for *an acre of land*, that *very* acre is an immoveable thing, capable of identification, and is the very subject of contract: it must therefore be decreed to him. This may be all very true; but it should be also borne in mind, that though he did not choose out and earmark *these or those particular* quantities of goods, yet it was *goods*, and *not goods' worth*, he contracted for, and goods let him still have, if the contract be broken. Give him corn, give him iron;—he will not care whether it is precisely the identical parcel of either or not,—*for that was not of the essence of the agreement*;—so long as it is in kind and specie the same,—*for that was*. Let the contract, or the specification, be examined, which contains the plan and form of the building, or the description of the goods; and an house, or goods, can as accurately be constructed or identified therefrom, for all essential purposes, as if they had really been in existence at the date of the contract. Again, it is said that goods, and such like things, have so much more a definite value attached to them, that one *can* measure the injury of the non-performance of contracts relating to *them*, and damages at Law will be equivalent to restitution. But besides the remark already made, and which seems unanswerable, that it was *goods, not money*, which B. contracted for, it is not true to say, that personal estate *is* more capable of being estimated than real. Do not valuers go through the length and breadth of the country, for the very

purpose of expressing in pounds, shillings, and pence, the marketable price of land? Nay, are not juries empanelled for the very object of expressing its money value? And if it be still further objected, that though the land may be thus *approximately* valued, yet it may be difficult, or impossible, to decide exactly what its value would be to the *particular person contracting* for it; I answer, the same thing may be said of goods. A man may have taken a particular fancy to this or that horse, which may give to it in his eyes a peculiar value, over and above its intrinsic worth. There is no telling of what importance it might have been for him to have possessed, on such or such a day, the stock, or the corn; nor how much he might have improved the article purchased, by his own labour, or judgment, or skill; in fact, the probability of such an improvement may have been the very circumstance which prompted him to the purchase. It is clear, in short, that numberless circumstances must always exist, which no public Judge on the Bench, or in the jury-box, can ever reach, that may enhance the value of each thing to the mind of each man.* To attempt to define that value, is, at the best, to adjudge a speculative remuneration; whilst to keep the parties to the terms of the compact which they themselves have chosen, is the part of safe and unerring Justice.

Marvellous then are the assertions so often made by the champions of our present deplorable Juri-

* 'Value is not measured by cost.' Per Denman, C. J., in Regina *v.* Hamlet of Mile End Old Town. April 24, 1847.

dical system, that Law and Equity harmonize in their functions;—that Equity follows Law;—that the two consist well together, a delightful confraternity, without collision of principles or practice. 'How well they understand one another,' they say! 'How aptly their respective constitutions supply one another's deficiencies! how admirably they pursue together the one grand end of both, the promotion of Civil Justice!' Such are the sentiments breathed in the text books, misleading the unprofessional reader into the fallacious belief, that facts really bear out those assertions, and that the division of the empire of Municipal Law between this affectionate brother and sister, is a blessing to the Commonwealth. 'The rules of property,' says Sir W. Blackstone,* 'rules of evidence, rules of interpretation in both Courts are, or should be, exactly the same.' I echo that '*should be*,' and insist upon it; but as to an *existing* identity of those rules, nothing can be further from the fact: as the reader will already have judged for himself by the foregoing illustrations.

By whatever name we choose to designate the discrepancies between Law and Equity, there they exist —diametrical—obvious—and complete; and it is to the *fact* of that existence, and to the *causelessness, and effects*, of that existence, that I am anxious to direct attention. Surely it is a paradox, in the very outset, that two sets of tribunals in the self-same country, often exercising their Jurisdictions over the same species of property, should uphold contradictory

* 3 Comm. 434.

rights, pursue different modes of establishing truth, and setting out from opposite data of construction, build up a series of antagonistic, and logically contradictory, conclusions for the guidance and obedience of a nation. Surely it stands to reason, that the maintenance of two establishments, *diversely organized*, must, even if they both pursued the same end, complicate and retard an *arrival at Justice*;* but when one of them alone entertains the question of RIGHT, and the other confessedly disregards it, in numberless instances, how must it not infallibly defeat it? Surely it must become a question of grave consideration to thoughtful minds, how far they are exercising justifiably their faculties, as accountable and reasonable beings, by helping to carry out a system rife with such incoherent eccentricities, and unutterable absurdities.

Hence it is too that the mighty fabric of our Municipal Law does not stand well with the affections and homage of the people. I do not say that it does not constrain obedience, or that it fails generally in being an efficient terror to evil doers; but does it command the love, and commend itself to the reason, of the peaceful, and loyal, and dutiful subject?† Else why such expressions as the follow-

* 'The complication inseparable from an advanced state of society was aggravated by the double aspect of our jurisprudence.' 1 Hayes' Convey. 109.

† 'As a lawyer myself: I say it with all deference to my learned friends around me, and whose frowning brows are knitted against me on the present occasion: [laughter:] I say it with all deference to you, Mr. Mayor—[laughter]—the state

ing, which are proverbial? 'The glorious uncertainty of the Law:' 'The quibbles of the Law:' 'The delays of Chancery:' and the like? Nay, does it not throw, like an evil blight, a kind of moral halo around those who are concerned in its Administration, suffocating their better parts, and eclipsing their natural graces? Can there be any concealment of the fact that Lawyers carry something forbidding about with them, in the estimation of their fellow men? Is not the term 'Lawyer' a term of anything but respect, through the length and breadth of the land? From the Duke down to the peasant, is he not an acknowledged nuisance; a permitted, because inevitable, but an unwelcome, incumbrancer? Ask the honest yeoman, as he stalks his broad acres, what he thinks of him. He shrugs his shoulders at the very name, and prays to be delivered from him. Hear what the village tradesman says, as he stands at his shop-door, and sees the man of Law hurrying with restless step down the street, and you may read in the language of his eye a volume of antipathy. Ask that shabby

of the laws of our land, improved as they have been by the County Courts, is still a disgrace to this country.' [Cheers.]

A voice. 'That it is.' [Bravo.]

Mr. Buller proceeded. 'The administration of the law, civil and criminal, chancery, and common law—I will even go so far, with the permission of Dr. Curteis, as to say Ecclesiastical Law—even the law of the Spiritual Courts—is the disgrace of this country.' [Loud cheers.] Extract from the speech of the late Judge Advocate at Liskeard, Sept. 21, 1847.

'The very name of Chancery is a name of dread in the commercial world.'—Per Mr. Henley, M.P., House of Commons, July, 1847.

old man, the wreck of better days, how he has come to this, and he will tell you, with a truthfulness of manner, which cannot be mistaken, 'The Lawyers have ruined me;' or dwell for a few moments on yonder widow's piteous tale, and you will learn that she has spent her last farthing '*in Law!*' Or, to take higher flights of general opinion,—does not the Squire look upon his Lawyer as a perpetual rent-charge on his estate? The sailor as he returns home from a glorious career of danger and enterprize, casts a glance of generous pity on the slow dweller among parchments, whose mind, wearied and entangled with the technicalities of practice, and plodding ever microscopically among fictions and rules of pleading, has at length become as cramped and confused as the dry mass of papers which surrounds him. Even Parliament, so prone to listen patiently to, and judge leniently of, the feeblest attempts of oratory, thins its benches as honourable and learned members catch the Speaker's eye.

Now whence is, why is, all this? It ought not so to be. What—it may be truly asked,—more noble than the study of such a science? Nay, what more indispensable, than a class of men set apart for the prosecution of it? What more useful, than a knowledge of those ties which bind men to each other in the complex labyrinth of society; of that unseen yet ever-present power, which tames the unruly, protects the injured, makes the great wheel of human affairs move regularly, and orderly, onward? I answer. The Laws them-

selves are in fault;—the system itself is out of order;—if *that* has lost the majesty which ought to belong to it, its disciples must proportionably suffer with it;—if *its* faultlessness be impaired, so must the excellency of the study of it. The Administration of the Laws is what every Englishman feels, by a kind of instinct, that he has an hereditary right to have vouchsafed to him, in as free, as certain, as speedy, and as intelligible a manner, as possible. It is in this very particular that the national humour is (so to speak,) most touchy. If men find the contrary of this the case, they will attribute some at least of the evils to those who embark and trade in the profession. They cannot keep distinct in their condemnation the possibly innocent minister, and the necessarily blameworthy enactor, of the Law. The one is something tangible, living flesh and blood,—the other is a part of bygone times, dead, and long forgotten. It is true, they may not very accurately reason on what they call the 'Iniquity of the Law,' but they feel it,* and feel persuaded that there is something rotten at its core; there is a simultaneous revolt of the understanding breaking out at all places, in all classes, against something, which they may not be able exactly to define, but which they know to be universally and gallingly oppressive, and which they would perhaps loosely describe, as a certain short-coming of Municipal Justice, as at present dispensed; as though it were niggardly meted out, and at a distance above the reach of those, who have a right to attain to it. Thus,

* ὃ τοῖς πολλοῖς δοκεῖ ἐστὶ. Arist. Ethic.

practically now-a-days, a man will compromise his just and full dues, rather than submit to the chances, delays, and imperfect redress of Law;—nay in many cases, where the property is small, and inadequate to the expenses of litigation, the suitors would be entirely impoverished, were they even to contest their claims; and it is utterly impossible, that in such cases any legal adviser should conscientiously think of recommending to his clients an assertion even of clear rights!

This is certainly an humiliating confession.—But the singularity of the malady seems to lie in this, that whilst it is admitted on all sides to be deeply seated, and to stand in need of a searching and radical cure, men shrink from addressing themselves to it, for its very magnitude. 'It is hopeless,' they comfort themselves by deciding: 'the task is too gigantic. There is much truth in what you state: it is indeed lamentable; but it has always been so: we must be content to submit to it: we are not worse off than our forefathers, or if we are, look at the state of society now: how can the Law be simple, which has to adjust such complicated interests? The Common Law, too, is so constituted that it cannot help sometimes becoming an instrument of Injustice: it was never intended that it should dispense Justice in all cases.' And thus they dare to brand as chimerical, remedies of which they have never bestirred themselves to consider the practicability; and to disparage, when it is sought to apply it to the festering necessities of our times, that which in the abstract they would be the first to commend.

Others vindicate their apathy in this sort of way. They challenge the production of a simpler Jurisprudence, hoping that none such will be forthcoming; and when it is produced to them, they unhandsomely conclude that the consideration which may be due to it as a whole, is cancelled by the inaccuracies which may be discoverable in its details.

But what sort of Philosophy is that, which founds, on the tenacity of an inveterate evil, an argument for its inviolability; or which, to maintain a reputation for unswerving consistency, refuses to mitigate an undeniable misfortune? Besides, what right have such reasoners to shelter themselves under a plea of the impossibility of a cure, when they are met on the surface by a striking symptom, *sufficient to account* for most, if not all, of the evils complained of, *and which they have never struggled to remove;* a symptom, which did not exist in our own country, when its Municipal Law was free from the imputations under which it now labours; a symptom, which never 'manifested itself in any other country, at any other time;'* and which therefore leads violently to the presumption that it is connected with those evils. But further, when we examine how that symptom has actually developed itself: when we discover that the distinction between Law and Equity, as administered in different Courts, practically renders, in many cases, two Lawsuits necessary instead of one; in others, altogether frustrates the ends of Justice; in others, obliges the suitor to accept a dry inadequate Legal

* 3 Bl. Comm. 49.

redress; and in many more, makes the boundaries of his Legal and Equitable rights so indiscriminate that he can easily mistake the one for the other;—can we any longer doubt that that distinction is itself a cause of the disordered state of our Jurisprudence? Can we any longer keep aloof from the suggestions, to which that discovery seems peremptorily to invite us? Therefore I contend that the first thing in the shape of an abatement of these anomalies must be SIMPLIFICATION,—a simplification, that is, not of parts and details only, but a root and branch demolition of the present System, wherever it interferes with the plain dictates of Reason and Justice—a removal of all superfluities—a reverting, as much as possible, to first principles, which are always few and simple. If a simpler model of Law be cast, a speedier and surer Administration of it must follow: if a speedier and surer Administration, a cheaper Administration also. These four requisites, Simplicity, Sureness, Swiftness, and Cheapness, are what our Law must be brought to possess, before it can resemble a perfect System. It must be Simple that men may understand it—it must be Sure that they may respect it—Swift that they may be avenged by it—Cheap that it may be universal, and every one resort to it. The first grand object then is to simplify the Laws relating to Real Property;—and this simplification must be two-fold. 1. A simplification of the Principles of Jurisprudence. 2. A simplification of Practical detail—each of which heads I shall reserve for distinct chapters.

CHAPTER VI.

ON SIMPLIFICATION OF PRINCIPLES.

At present, as we have seen, the two antagonist Tribunals of Law and Equity start from, and proceed upon, different principles. *In reality* Law is Equity, and Equity should be Law; but contrary to the principles of its original establishment, Law has become manifestly unjust; and even Equity, although professing to act on wider principles, has not carried them out to an extent commensurate with those professions. Now why have the attempts which have been hitherto made to simplify the Laws of Property failed in effecting any comprehensive improvement, and in relieving them of the stigmas which 'disgrace' them. Why, but because those attempts have been directed against the practice, and not against the principles of our Law: and how can we ever hope for an healthier system if these are left untouched? New cloth has indeed been put into old garments. The rags of our tatterdemalion Jurisprudence have been covered with the mantle of Imperial impeccability; but

the rent has been made worse, and the 'splendid fraud' revealed. What great principle of Law has been involved in, or evolved from, the abortions of Modern Legislation? Show me a statute which can cope, for principle, with that famous one of 'Uses;' or with those of Elizabeth, and Charles the Second; or with that of Anne.* *We have beheld as yet* only the pin-scratches of Reform: *we want a fusion of the principles on which Legislation is to proceed,* — a singleness and oneness of Jurisprudence.

This would be effected, by either merging the Equitable into the Legal, or the Legal into the Equitable, principle. Now though the former scheme would effect Simplification, and an unity of procedure, it would be at the loss of that increased expansiveness in the principles of Law, which society now requires. It would be a retrograde movement, and in the wrong direction. We should have a Simplification, without the Spirit, of Law.—But a merger of the Legal into the Equitable element would be free from all the following objections.

1. It would be free from the objection of laxity, and want of proper formulæ, of uncertainty, capriciousness, and indefiniteness; for the Equitable principle has been long since guarded and worked

* 13 Eliz., c. 5, 27 Eliz., c. 4, protecting creditors and purchasers *from fraud.* 12 C. 2, c. 24, abolishing military tenures, and 29 C. 2, c. 3, s. 10, making *Equitable* interests in land assets *at Law.* 4 & 5 Anne, c. 16, establishing an *Equitable* rule of decision *at Law* with respect to Bonds.

out, through the medium of rules as rigid, of a system as complete, of an establishment as elaborate, as the Legal. It has not been, for many ages, the individual opinion of the Chancellor which has measured Equity:—the application of the Equitable principle does not fluctuate with a Whig or Tory Government;—it is based on precedents, and rooted in authority, as immutable and as artificial as the elder branch.

2. Neither by such a merger would the Courts of Law be called on to do that, which would be repugnant to their own principles;—not to their *original* principles, which, as has been shewn, must *in rerum naturâ* have been, or which admitted of being, co-extensive with the principles of Equity;—nor to their more modern and adopted principles, for even according to *them*, Law has been enabled, and is now able, to entertain Jurisdiction, though in a meagre and reluctant manner, of the very subjects which fall more properly within the confines of Equity. It would be no departure, for instance, from those principles, for a Court of Law to find itself in harmonious co-operation with a Court of Equity taking cognizance of *Trusts*, because it already recognizes them, in its own peculiar and artful sense; it knows what Confidence means; it lends its ear to the injured confider, and brandishes its sword of vengeance over the terrified betrayer of the trust; and that, even when the confidential relationship is created, not by express words, but by implication only. Else why, in the former case, does it take notice of goods deposited

in trust with a common carrier? * or, in the latter, of presumptive undertakings, (as Blackstone calls them; †) as, if A. employ B. to perform any work for him, (without more,) the Common Law will assume that A. undertook to pay B. his labour's worth, and saddle him with what is neither more nor less than, a Trust? It would be no departure from those principles, for Courts of Law to find themselves engaged in unison with Equity issuing preventive remedies, as Injunctions; for though disused, those Courts once possessed the power of stopping future mischief, as well as of compensating for past damage. ‡ It would be no departure from those principles, if Courts of Law entangled themselves in those perplexing cases of Account, which form now the peculiar province of Equity, seeing that, for a long period, actions of Account were among the recognized channels of Common Law relief. § Neither would it be a matter of indignation to the departed shades of Kenyon, Tenterden, and Mansfield, were they to behold the Courts, of which they were the brightest ornaments, stretching out the right hand of fellowship to Equity, in cases of 'Specific performance;' since to restore the very thing wrongfully withheld, and not merely to assess damages for the withholding, is a doctrine which has ever been, partially at least, maintained and acted upon at Law, if the particular circumstances of the case brought it within the sphere of its operation. Witness the old action of Detinue, which

* Smith's Merc. Law, 260.
† 3 Comm. 161.
‡ 3 Bl. Comm. 225.
§ 1 Story's Eq. Jur. 353.

gave specific restitution in the exact sense of Equity. *

The proposed merger then would do no violence to the principles of the Common Law; and would leave the Equitable principle as it is now; but it would abolish those evils, which I have endeavoured to point out, as resulting from the inferiority (so to speak) of the present principles of Common Law, and their *practical* inadequacy to meet, at the same time that they are *in theory* supposed to meet, the demands of society. Legislation indeed cannot abolish Trusts; to the end of the world one man will make another his trustee;—without this, family arrangements, testators' intentions, the convenience of buyers and sellers could not be supported; and a Legislation which made trusts illegal, would be itself tyrannical. But what it can and ought to abolish, is the anomaly of any other rights than those of the real substantial owner being at all regarded by a Magistracy framed 'to execute Justice, and to maintain Truth;' a doctrine so monstrous, ever since the days when the old fictions of tenure ceased, (and with them the Legal importance of a trustee's Legal ownership,) that the only wonder is, that amidst the social improvements of these latter times, it should have been left to flourish and abide so long. Henceforth let the system revert, as to this, to what it was in the time of Henry the Eighth. The statute of 'Uses' did in fact constitute a Court of Law a comptroller of

* Selwyn's Nisi Prius, title 'Detinue.'

Trusts in the fullest sense. If that Statute had been rightly apprehended, Courts of Law would have from that time downward been, except in their machinery, Courts of Equity: but repudiating the tender made them by the Legislature, they would not receive Trusts within their bosom; and they devolved upon Equity.

The distinction between Trusts and Legal estates being once overthrown, and the Equitable principle being the only one to be aimed at in both Courts, the other distinctions between Legal and Equitable Jurisdiction would soon vanish likewise. For then the spirit of Equity, which is the perfection of Law, being breathed into the Ordinary Courts, no impediment would arise to its free and unfettered circulation. There would be an end of 'Injunctions to stay proceedings at Law,' because proceedings would never be there upheld, which it was Inequitable to pursue and continue. No Injunctions would issue to prevent a party from setting up a Legal, but Inequitable, defence at Law; for the Court which used to adjudicate on its legality, would be now also the Court to pronounce on its Equity. No Extraordinary edict would be now required, to aid a party, who possesses a sound Equitable defence, in arriving at it by searching the conscience of his adversary on oath; for it would be a fundamental and admitted principle in the Ordinary Administration of Justice, so to do. No 'Patent' or 'Copyright' cases would be bandied from Equity to Law, and from Law again to Equity, for now the same Court which would judge of the balance

of evidence, would be the Court to issue the preventive, and only substantial, remedy. Now no longer would a 'Specific performance' of agreements be decreed in one Court, and refused in another;—compensation in money being deemed an equivalent for a breach of contract on one side of Westminster Hall, but nothing short of actual fulfilment being deemed so on the other; for the same Court would be Lord over all, rich and expansive in its principles of Justice, and uniform in their Administration. No longer would the staring anomaly exist, of a distinct ground for Jurisdiction in matters of 'Account' being founded in one Court, *because the other lacks machinery (!)* to deal adequately with such matters; for the powers of the Court which was heretofore inferior to the task, would now be swallowed up in the plenipotentiary ministrations of Equity; and the incredible absurdity would be saved, of a Court of Justice professing, and assembled, to take cognizance of subjects, which it confessedly is without the means of grasping and adjusting. Henceforth, no cause would be 'Demurred to' at the very outset, because perchance it falls within the arbitrary limits of one Court, but is inadvertently brought before another, for now there will be in both a communion of operation, and a centralization of Jurisdiction.

3. In considering whether the substituted principle of Jurisprudence, should be wholly a Legal, or wholly an Equitable one, it is impossible not to remark, how the tendency of modern Legislation has been in favour of the latter, rather than of the

former; how the 'Right and Wrong' of Civil conduct has been estimated more and more according to a moral standard; and how even the Courts of Common Law have of late inclined in some respects to a liberality of construction, the bare thought of which in former times would have thrown Palace Yard into an uproar. Now-a-days, how nicely do Courts of Justice weigh the morality of the actions of mankind; how exact an observance of '*uberrima fides*' is now, even Judicially, required in the transactions of common life! How narrowly do they scrutinize motives, and how searchingly they dive into the secret springs of intention! How vigilantly they detect, arrest, and reprimand, the very beginnings of evil, not only of fraud, and undue advantages, in their open and notorious forms, but of even negligences, and ignorances, of inadvertent concealments, and inconsiderate participation in the malpractices of another! So that to fuse the Equitable into the Legal principle, would be, apart from all other objections, to turn back, as it were, the current of feeling, which has been setting in, and circulating society,—it would be to dam up the course, which a more enlarged love of Justice has been working out for itself, and would plunge us once again into a state of forensic heathenism.

4. Nor can the most zealous champion of Legal conservatism successfully adduce, in refutation of the contemplated fusion, the veneration due to long-established customs, and immemorially fostered usages. It would sound well and speciously,

indeed, for the constancy and fidelity of our Law Lords, and learned Senators, to be able boastfully to exclaim, 'The Common Law of the nineteenth is identical with that of the twelfth century;—we have preserved unshaken the traditions of remote generations;—we have kept the very Laws transmitted to us. Behold the revered compilations of Feudality—the monuments of baronial greatness—the links that connect you all freshly with the mighty Past. Are you now, with sacrilegious hands, going about to obliterate those inviolable deposits, and change "the customs delivered to you?"' But the answer is plain, '*Fuit Ilium.*' Time was, but is no more, when feudality, and its princely retinue, flourished and prevailed; when military tenures overspread the kingdom; and when the existing Jurisprudence of the day may have assorted well with the social and political phases of things. But in the year of our Lord one thousand six hundred and sixty-one (12 C. 2.) a death-blow was dealt to the prerogatives of Feudality.—Wardships, and liveries, primer seisins, and ousterlemains, values, and forfeitures of marriages, fines for alienation, tenures by homage, knight service, and escuage, aids and reliefs, and all such-like engines of territorial tyranny, and agricultural impoverishment, tottered and fell; and 'a statute was passed,' (to use the expressive words of Blackstone,*) 'more precious than Magna Carta itself, since that only pruned the luxuriances that had grown out of the subsisting tenures, and thereby preserved them in vigour, but the statute of

* 2 Comm. 77.

Charles extirpated the whole, and demolished both root and branch.'

And since, 'when the cause is no more, which rendered necessary the creation, or justified the continuance, of a Law, that Law itself should cease;'*—the obligation to uphold a code of Laws must expire with the circumstances and expediencies which produced them. The duty of obeying the fifth Commandment cannot be read to one who is an orphan;—reverence the memory of his parents indeed he may; but as to any present service of active obedience to them, how can the dead claim it? And so it is surely too late, to urge adherence to principles which took if not their origin, yet at least their tone and colouring, from the Feudal System, when that System itself is no more. It is vain to attempt to overawe the Reformers, the root and branch Reformers, of the Law, with arguments plucked from the barren stock of antiquity. We ourselves indeed affectionately reverence antiquity; we embrace its memory as dear to us,—we enshrine its associations amongst our holiest things; but we cannot submit to be deterred, in the sight of gigantic errors, from a work of progressive amelioration, by visions of imaginary obligations conjured up and floating before us, not to disturb 'The Past.'

5. Not only were the prerogatives of Feudality annihilated, and therewith the shelter which the

* Cessante ratione cessat ipsa Lex. Co. Litt. 70. b.

Common Law had derived from them cut down, by the Statute of Charles but the Legislature; (as if no longer admitting its claims to exemption from Statutory interference) is every year and month of the Session sending a sword through the vitality of its surviving parts. One day it abolishes without mercy the Law relating to uncertain and expectant interests in land;—('*contingent remainders*')—at another, reinstates that Law, at pleasure, in its primitive condition and vigour. — Here it gives a *legitimate* and *Rightful* operation to deeds, which the Common Law had for centuries declared—(strange declaration indeed!)—could only confer a *Wrongful* title to lands. There it *narrows* the effect, which the Common Law attached to certain words and instruments of conveyance; — whilst here again it dispenses altogether with the solemnities which had always been rigidly required for the valid transfer of various kinds of rights.*

Thus, the Majesty of the Common Law has been assailed,—its symmetry impaired—and its uniformity destroyed, unflinchingly, and unresistedly. So that now the old Municipal Law of England may be said to be in a kind of passage state,—partly what it was, yet for the most part different; enfeebled, crippled, open to the assaults of every ephemeral Legislator. There is now no crime of treason against it,—for it has been dethroned.

* Compare 7 & 8 Vict. c. 76. ss. 2. 6. 7. 8 and 8 & 9 Vict. c. 106. ss. 1. 4. 8.

There can be no violation of its characteristic principles,—for it has been despoiled of them. There can be no conservation of its integrity,—for its every member, has been fractured and mangled.

CHAPTER VII.

ON SIMPLIFICATION OF PRACTICE.

As simplification of Principles must precede, but by no means necessarily involves, simplification of Practice; so without it will it remain useless and unproductive. How then is simplification of Practice, to be attained? Now I am not about to enter into a disquisition upon the details of that Practice, as it governs our Equity and Common Law Courts:—that most uninteresting task is being daily performed by those better versed in it by experience. But what I propose is, to enquire how a generally simplified *outline* of Practice may be devised, in keeping with the simplified Principles I have suggested;—an outline susceptible of having hereafter engrafted on it, by any general Order of Court, or otherwise, such modifications of detail, as might be deemed expedient.

Now the first thing which strikes one here, as well as on the question of a simplification of Principles, is this, that there must be an *Uniformity* of Practice throughout the Judicature. And inasmuch as Truth is, or ought to be, the aim and object of

all Judicial research, we will, in the present chapter consider how far a simplification of Practice would be effected, consistently with the elucidation of Truth, by *amalgamating the Laws of Evidence*;—and the subject will readily subdivide itself into the consideration, 1, Of the persons *by* whom Truth should be established. 2, Of the *mode* in which that proof should be conveyed. 3, Of the persons who should *decide* on the sufficiency of that proof. These points then we will proceed to examine a little more narrowly; only so far reversing their order, as to take the last of them first.

1. Of the persons who should decide on the sufficiency of the proof.

Here, I am aware, I am about to suggest a modal alteration of primary importance, which will at its first enunciation be unpalatable to many minds: but let us weigh the alteration dispassionately, and upon its merits. The whole world, probably, knows that one of the main present *practical* differences between Law and Equity is the mode of trial, or more correctly, of Judgment, which they respectively adopt—Law deciding by a Jury, Equity by a single Judge. Now it is not desired here to touch the Jurisdiction of a Jury *in Criminal cases*. That indeed is of the very essence of the British Constitution, and without that, it could no longer remain in that integrity, which all lovers of their country must wish to see it maintain.—To this portion of the administration of Law the composition of a Jury seems admirably suited, upon the whole. I say, upon the whole; both because the excel-

lence of the rule, which requires complete unanimity among twelve, may be justly questioned; and also because, even of Criminal cases, some are doubtless beyond the comprehension of uneducated men: but as a whole, it seems scarcely susceptible of improvement. Let it be granted then, that Crown cases are within the sphere of the intellects of Common Jurors;—of plain facts, occurring in the every-day transactions of life, and generally among classes most nearly resembling their own, in station, habits, feelings, and occupations, they may, and are most likely to, be not only competent, but the very best, Judges. But beyond this their efficiency does not extend. Trial by Jury as a mode of decision in Civil causes is preposterously absurd.—Of those suits which primarily come before them for decision, look how vast a number are, even now, ultimately removed to, and substantially decided by, Judges sitting in 'Banco,' as* involving questions of Law, too commingled with questions of fact, to be left with propriety to them: and even of those in which the ultimate decision *appears* in the shape of a verdict undisturbed, how often has not that decision depended on, and the key to it consisted in, the previous summing up by the Judge? In the former class of cases, there is so rarely a state of circumstances entirely consisting of facts, and devoid of points of Law, that the Jurors *must* be inadequate Judges:—in the latter,

* The Judges of the Common Law are said to hold Sittings in Banco, when they assemble to deliberate, without a Jury, upon points of Law reserved on, or arising from, a trial.

there is as rarely a case that is made up wholly of facts, throughout which, they can laboriously pursue a train of thought, without leaning upon the Master-mind of the Judge for a correct exposition of those facts.

But in answer to this, it may be said, a *Special* Jury may be, and is, summoned to decide on *special* cases;—cases, that is, requiring more than the powers which belong to ordinary Jurors of tracing cause and effect, weighing conflicting evidence, pronouncing on matters of large moment, and the like;—a Special Jury, at all events, is equal to the work of Judgment. This objection however is one entitled to very little consideration; for a Special Jury, it must be borne in mind, requires to be charged with all the facts of the case by the Judge, in the same manner exactly, as a Common Jury; so that if the argument from greater intellectual capacity is to be carried out to its full extent, the Judge's apprehension of the facts is just as likely to be correcter, in consequence of his superior sagacity, than that of a Special Juror, as the apprehension of the latter is likely to be correcter than that of a Common Juror. The fact is, that in all cases the Judge much sooner, and more fully, *possesses himself of the facts, and is the only one who knows the Law*, and therefore, as far as the elucidation of Truth is concerned, might much better give utterance to the decision which he formally reserves for the Jury. So that the argument, which at first sight would seem a fair one in favour of universal trial by Special Juries, (were such a thing possible,) becomes in fact

a reason for the abolition of Juries altogether. But should the danger be objected of investing a single Judge with an absolute control in the matter, on account of his liability to bias and party feeling, I answer, 1. That no one, *in point of fact*, dreams at the present day of suspecting a Judge, *à priori*, of such a weakness. 2. Let there be, if necessary, two or three Judges, amongst whom a conspiracy in bias would be scarcely, even in hypothesis, possible. 3. That if there were a fair ground for suspecting the integrity of a single Judge, the objection would be fatal to the decisions of the Equity Bench, who now have a larger share of important business to adjudicate on than the Common Law Courts, and who are continually sitting to pronounce on facts? But did it ever occur to the most suspicious fancy to imagine, that in this case, the absence of a Jury is a real impediment to Justice? — Nay, was not the Court of Equity, as a separate Tribunal, established subsequently to the Courts of Law?* and would it have been so constructed, and continued so constructed, with the general approbation of society, if trial by Jury had been by experience found to be a privilege so dear to our liberty-loving countrymen, or an essential ingredient in Jurisprudence?

There is a deal of foolish superstition afloat, in the minds of those who have not much considered the question, as to the excellence of trial by Jury. It sounds well to the ear, it looks prettily in a picture, to see the fate of an offender sealed by nothing short of perfect unanimity amongst the mys-

* Supra Ch. II.

tical number of Twelve;—and those Twelve, his equals, as the fiction of law has it. But with respect to their *unanimity* of decision, they who have ever troubled themselves to think, how difficult it is to find an agreement, even among two or three, on any given subject, excepting the most palpable, will be persuaded that unanimity among four or six times that number is, *in any single case*, most improbable, but *in all cases*, utterly incredible; and that an unanimity of *verdict* by no means implies, or is the test of, an unanimity of *sentiment and conviction*.

Lastly, if the prejudices of mankind are to be regarded, I admit that in cases of crimes and misdemeanors,—which are in fact, in contemplation of Law, offences committed against the public themselves,—the general sympathies of the community are enlisted in favour of the old régime, and society at large may feel a sort of personal interest in the mode in which, and the Judges by whom, the guilt or innocence of the prisoner is established;—but when we bethink ourselves of the nature of the subject-matter of *Civil* causes,—how in them the finest shades of mercantile and commercial credit are contained, and transactions involved, not coming within the category of offences against the State, but wholly of a private nature;—transactions, which trench closely upon the province of morals;—transactions, in which Right and Wrong are so commingled, that the point of their separation can be ascertained only by careful and laborious research;—transactions, in the course of which the exercise of many grave intellectual functions is

among the legitimate and necessary offices of the Judge—then, I say, the public cease to take an interest in the mode of investigation, because it is one beyond the reach of their understandings; then the case loses, in their eyes, its distinct character of personality and the redress of the injured, and the punishment of the injurer, is committed by them with indifference and apathy to the indiscriminate determination of Judge or Jury.

2. Of the persons by whom Truth is to be brought to light.

The rule which obtains at Law upon this point, we have elsewhere stated to be this, that the evidence of *a party to the cause* is inadmissible in the cause: whilst Equity, on the contrary, admits such evidence.

Upon this rule hinges the main feature of contrariety between Law and Equity, as to the avenues through which Truth is to be approached. Now it is abundantly plain, that the parties most likely to be able to give any information respecting the question in dispute, must be those between whom the suit exists, and who are individually named on the record of the proceedings. The principle however, upon which this variance of Practice depends, is this; Law considers the advantage of possibly gaining the required information counterbalanced by the probability of the interested party forswearing himself, and that his Evidence will not be credible; —whereas Equity, trusting rather to his reverence for an oath, receives the Evidence, and rejects the objection to it. The case then stands thus. A suitor

is obliged, by a rule of Law, to bring his action against the parties principally concerned in the transaction, and is then debarred, *because they are parties*, from eliciting from them those particulars, which he might have elicited, had they not been parties! But the plaintiff so precluded *at Law*, may bring *another suit in Equity*, against the self-same party, and *there* obtain the desired information from him. This looks very much like reaching Justice by a circle. But let us hear Blackstone's strong language in this matter; '*It seems the height of Judicial absurdity*, that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties, should be permitted on one side of Westminster Hall, and denied on the other; or that the Judges of one and the same Court, should be bound by Law to reject such a species of evidence, if attempted on a trial at Bar; but, when sitting the next day as a Court of Equity,* should be obliged to hear the examination read, and to form their decrees upon it.—*In short, Common Reason will tell us, that in the same Country, governed by the same Laws such a mode of inquiry should be unanimously accepted, or unanimously rejected.*'†

Then I say, *let* the rules of evidence *be* henceforth the same. The necessities of mankind, the calls of Justice, the voice of Reason, alike require

* He here refers to the Equity side of the Common Law Court of Exchequer, which has, in the present reign, been abolished.

† 3 Comm. 382.

it. And can we doubt whether here again, the Legal or the Equitable principle of Evidence, should be adopted?—If Truth be the object of our search, we cannot long pause; let all testimony whatever, and from what quarter soever, be received with open arms, which can throw any light upon that most mysterious and important of all sciences, the Discovery of Practical Truth; let whatever objections may arise to the reception of Evidence from corrupted, or biassed, or suspected sources, go only to the *credibility*, and not to the *competency*, of the witness.

We were tempted to expect great things, four or five years ago, when it was reported, that 'An Act to improve the Law of Evidence' was in course of framing, and passing through the House of Lords, under the auspices of the Chief Justice of England. And the Act has been produced;* and such an Act as it is! Professing to put the Law of Evidence on its true footing, it has left it, with insignificant exceptions, exactly where, and what, it was;—it came forward with a magniloquent recital, but ended in a feeble enactment;—it sounded largely in the preamble, but issued in exceptions, which nullified the application of the principles on which it claimed to be founded. For, after declaring that witnesses should not be excluded from giving evidence, in *any* Court of Justice, by incapacity from crime or interest, it proceeded to except from its operation those very persons, whose testimony it was most desirable to secure by Parliamentary enactment, *because they were most likely*

* 6 & 7 Vict., c. 85.

to know the facts in dispute, namely, the *dramatis personæ* themselves—*the parties to the suit*.—The Act however did not stop there, but with an inconsistency, truly wonderful, proceeded to allow to Equity, what it had just before refused to Law; clogging nevertheless the operation of the enabling clause, even in Equity, with the appendix, 'saving just exceptions.' So that by it, first of all, *everybody was empowered* at Law and in Equity to be a witness, *notwithstanding interest*:—then *every one was disabled* AT LAW from being a witness, *who was sure to be most interested*;—and lastly, every one whose Evidence might be *justly excepted* to (without saying what '*just exceptions*' were) was excluded from giving it *even in Equity!*—Now, reader, having faithfully given you an abstract of the Statute, what think you of it? But in order that you may judge for yourself, and not depend for a notion of this precious piece of Legislation on my exposition of it, I insert verbatim, in a note below, such part of it as refers to what we have been considering—viz., the Extension of the Principles of the Admissibility of Evidence.* You will observe that

* 'AN ACT FOR IMPROVING THE LAW OF EVIDENCE.'

'*Whereas the inquiry after Truth, in Courts of Justice, is often obstructed by incapacities created by the present Law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them*, and that such persons should exercise their judgment, on the credit of the witnesses adduced, and on the truth of their testimony. Now, therefore, be it enacted, &c., &c., that no person offered as a witness, shall

the Act in its preamble admits the soundness of the proposition I have ventured on above, 'that all testimony whatever, and from what quarter soever, should be received;'—and then neutralizes the

hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any Judge, Jury, Sheriff, Coroner, Magistrate, Officer, or person, having by Law, or by consent of parties, authority to receive and examine evidence,—but that every person so offered, may and shall be admitted to give evidence on oath, or solemn affirmation (in those cases wherein affirmation is by Law receivable), notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, in which he is offered as a witness, and notwithstanding that such person offered, as a witness, may have been previously convicted of any crime or offence. Provided that this Act shall not render competent any party to any suit, action, or proceeding, individually named in the record, or any lessor of the Plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person, in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively. Provided that in Courts of Equity, any defendant to any cause pending in any such Court, may be examined as a witness on behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions, and that any interest which such defendant so to be examined, may have, in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.'—6 and 7 Vict. c. 85. s. 1.

effect of such an admission, by abstaining from engrafting upon it any corresponding enactment! I ask then. 1, Why should different rules prevail, in Law and Equity, with regard to the admissibility of Evidence? 2. Why does the Legislature in the same breath, in which it declares the supposed incapacity from interest to be no sound ground for the exclusion of Evidence, exclude, as incompetent to give evidence, all those persons who are most interested? 3. Is not the Equitable rule the truer rule of the two, and why is *it* not to be extended to all Courts alike? May we live to see the day, and that at no distant period, when Lord Denman's Act shall be reconstructed upon a broader basis, more enlightened principles, and a truer wisdom!

3. Of the mode in which the proof which is admissible should be conveyed. The Common Law method, as almost every one knows, is that of taking Evidence *vivâ voce*,—by oral examination, and oral cross examination. The witness is a visible, substantial, active thing;—but in Equity, *all Evidence is in writing;* he who gives it scarcely so much as exists in the contemplation of the public: his admissions or denials fall dull and heavily on the ear of the Court: he did appear perhaps, some months ago, before an Examiner in Chancery Lane, or a Commissioner in the country, and there set his hand to a written defence, which had been all-ready-cut-and-dried for him by his Counsel, and was then read over to him:* but that was all;—

* I am *here* speaking of the 'pleadings in Chancery,' which come as strictly within the notion of 'Evidence' as the 'Depo-

with that single exception, he has been an invisible agent behind the scenes,—an unreal and shadowy apparition in the drama;—a thing of nought. Now here, the contrast is undoubtedly unfavourable to Equity;—but we must not hesitate to adopt what we find of good in each, and transfer it to the other; impartially looking onward how best we may embody a System, which, whilst it carefully avoids the evils, gratefully avails itself of the good, of that which we repeal. But this is not all. Be it known, that a volume of intricacy results from this usage of written Evidence, *if the Plaintiff is disposed to be contentious.*—Suppose a party, defendant to a Chancery suit, 'answers' unsatisfactorily,—that is, suppose his Counsel to have 'answered' unsatisfactorily for him, (or as it is technically said, 'insufficiently,')—the case made against him by the plaintiff. Suppose him, for instance, to have with difficulty and diligence extracted from the mass of matter, with which that case groans, what it is to which his 'answer' is required, and to have, with the best intentions, and *bonâ fide*, set about giving that 'answer,' but to have misconstrued the extent to which it was required, or to have omitted points, which were within the literal scope of the 'bill;' and to which therefore, strictly, the plaintiff was entitled to an 'answer.' What follows? The plaintiff has no opportunity of confronting his adversary in person, though he has of putting him on his oath—(which is in itself an inconsistency)—

sitions of Witnesses do, to which however that term is technically applied, and which we shall presently consider.

he cannot, as at Law he might, (were the party a witness,) re-examine him summarily, and instantly, as to the omitted points; but is driven to the awkward shift,—awkward, because needlessly indirect, costly, and uncertain, — of reducing again *into writing* the precise points, which he alleges remain unanswered,—of delivering them *in writing* to the defendant,—and of demanding of him to supply the omissions by a 'further answer' *also in writing*. Should the defendant, thinking he has already sufficiently 'answered,' refuse to comply with such demand, there is no Judge at hand, who in a moment might settle the disputed point,—*as at Law*,—but the question has to be formally re-opened, and tried, before a Master in Chancery. Nor is the Master's decision final: and either party dissatisfied with it, may bring it under the review of the Court;—in this stage of the proceedings another argument arises:—Counsel are employed afresh;—additional Solicitor's costs incurred;—new briefs made out;—and the matter now comes solemnly on again,—(a fruitful offshoot from the original stock of litigation,)—under the denomination of 'Exceptions to the Master's Report!' Here no doubt the parties have driven each other into a corner, and the Court's decision is final;—but supposing the defendant, in obedience to the plaintiff's demand in the first instance,—or to the Master's order, (if that was against him,) in the second,—or to the Court's decision, in the third,—tenders another defence, and that is, in its turn, considered 'insufficient;' or if he still puts in a third 'answer,' and that is yet objected to; each may be 'excepted to,' and the same steps taken

mutatis mutandis, and the same process repeated ;* whereas all this intolerable farce, — for it deserves no other name,—this wasteful war of words, might have been avoided and crushed in its birth by adopting the simple expedient of the Common Law,—oral examination, with a presiding Judge on the spot to determine, on his own *ipse dixit*, the propriety of the plaintiff's persisting in, or withdrawing, his demand.

To the above specimens of Equity Practice I will add but one other, which, if possible, is of more frequent occurrence, and more extensively mischievous, inasmuch as it is to be found in all suits, where the Evidence of witnesses (other than the parties to the suit) is required; whereas those which we have already complained of take place only in litigated suits, and can be avoided at the pleasure and option of the plaintiff. I allude to the Equity mode of examining witnesses. Now a more roundabout method could not easily have been conceived, for procuring proof of a given subject, if circuity had been aimed at. The Counsel for the party wishing to establish a statement by proof frames in his dark 'chambers,' at a distance it may be of hundreds of miles from the witness to be examined, a string of written questions to which the Solicitor instructs him that the witness is likely to depose, so framing them as to embrace all the items, and incidental circumstances, connected with each main question. These are called 'Interrogatories for the Examination of witnesses;'—*each answer* to each one of which has to

* 2 Dan. Ch. Pr. c. xv. s. 4.

be taken down in writing from the mouth of the witness, and transmitted by the proper officer to the Court. But a witness may demur to answer certain questions,* or a party to the suit may object that the questions, or the answers to them, are improper; — should this be the case, writing is again to be resorted to, for the purpose of conveying to the Court the grounds of the various objections, which are not set finally at rest, until a Master of Chancery, or the Court itself, has had them solemnly opened before them, and pronounced their decision.

Alas! how worse than valueles must be that inquisition, where the *Examiner* is *necessarily* ignorant of the nature and subject of the suit, and of the tendency and drift of the examination *which he has to conduct:* and where those, who *are* professionally concerned in the cause, and conversant, therefore, with all its particulars, are by a rule of the Court prohibited from taking any part whatever in the examination! What an insult to Justice, that such a viewless scrutiny should be called the touchstone of Truth, and the issue of our greatest causes made to hang upon the frail thread of some scanty testimony muttered within the closed doors of a remote village ale-house! As if it were not the easiest thing in the world for an unwilling witness to evade altogether, and the most difficult thing for a willing witness to meet pertinently and closely, such an inane investigation!

The crowning anomaly, however, of this portion of Equity Practice consists in her doctrine of Cross-

* 2 Dan. Ch. Pr. 555, 574, et. seq.

examination. The only object of Cross-examination is, as every one must be aware, to sift the credibility, and test the sincerity, of an adverse Examination in chief. Imagine then the imbecility of a System, which denies to the party Cross-examining the power of confronting the witness to be Cross-examined, and even the means of arriving at a knowledge of that which the witness has already deposed to! Imagine the nugatoriness of rules framed on such principles! Let us consider for an instant what the anomaly amounts to, A witness is summoned for examination before an officer of the Court of Chancery: he is examined by that officer, and in his and in his clerk's presence only, on behalf of the party producing him. Then comes his Cross-examination. But the party so desiring to cross-examine him was not allowed to be present at his Examination in chief, nor has, it may be, till the instant before, been furnished with so much as his name; and yet he is expected, through his Solicitor, on the spur of the moment, without the opportunity of consulting his Counsel, without knowing the purport and result of the Examination in chief—is expected, I say, according to the theory of Equity, to be able to effectually scrutize, counteract, and invalidate that Examination!

'How then,' it may well be asked, 'if this be so, can any Cross-examination take place *at all;* how and whence are the materials for it to be procured?' Will you believe it, reader, the process by which this *thumbscrew* (!) of evidence is applied, is by anticipating (as far as may be) *conjecturally*, the tenor of the witness's Examination in chief; and, on

the assumption that *he has* deposed to the effect to which it is possible he *may have* deposed, by framing the questions for his Cross-examination solely on the footing of that conjecture! Was ever Justice so raffled for? Are dice to be thrown for the great prize of Truth? And yet—*horresco referens*—such a perfect outrage to common sense exists unchecked in the middle of the 19th century, under the auspices of the Chief Judge of Equity, as part of our national Jurisprudence!

The whole constitution of Equity then, in this particular, proceeds, I conclude, on the notion that *writing is a safer conductor of Evidence than speaking.* How far this assumption however is from being a reasonable one, may be determined by the following consideration. If written evidence *were* the safest, *surely it would be adopted, which it is not, in the gravest cases,* where safety of proceedings is most necessary,—on indictments, for instance, for crimes or misdemeanors. Then if not *safer*, surely no one can contend, that it is a *simpler* mode of proof, and if neither safer, nor simpler, why retain it? Let us admit the principle, that a man is, to say the least, *as likely to speak truly, as to write truly,* (and why is he not?)—and that oaths are of the same pungent efficacy in Equity, as they are at Law (and why should they not be?)—and I see not why Equity may not vie, in the celerity of her dispatch of business, and in the effectiveness of her inquiries after Truth, with the elder branch of the Judicature. She already outstrips it in the Equity of her Principles, why should she not also match it in the straightforwardness and simplicity of her Practice, of Evidence?

CHAPTER VIII.

ON FRIENDLY SUITS.

A stranger to the mechanism of our Courts of Equity no doubt imagines, that a Chancery suit is a very acrimonious proceeding—full of ill blood —a last resource, when all overtures of reconciliation have been exhausted in vain. And such, no doubt, would be a correct idea to form in many cases. But he has yet to learn, that the larger number of Chancery suits are what is called, Amicable, or Friendly, suits,—suits conducted with all good feeling by the opposing parties, who are no otherwise opponents, than as they happen to be named, for the sake of perspicuity in pleading, and in conformity with the technical rules of the Court, on opposite sides of the record. In the language of Equity, the word 'plaintiff' by no means necessarily implies a party complaining of the acts of another,—nor the word 'defendant' a party labouring under the *primâ facie* imputation of having done a wrong. Of this nature are suits depending on the construction of wills: suits re-

specting charities: 'Administration suits,' (that is, suits in which accounts of a testator's estate are required by a legatee to be taken under the guidance of the Court;) 'Creditors' suits,' (or suits which seek the Equitable distribution of a deceased debtor's property among the claimants;) suits for appointing new Trustees; and the like. In all these there is something to be done, which cannot be done, without the sanction of Equity, by way of indemnity to the party doing it. Who, for example, is to interpret the rights of various legatees under an obscure Will, except the Court? Who is to remodel a Charitable institution, but the Court? How are Executors, or Trustees, to be protected in the duties cast upon them, except by the intervention of an authority as omnipotent as the Queen in Chancery? All this is just enough. But what will you think, when I tell you, that all these confessedly Friendly proceedings, wherein all the parties are consenting parties,—are conducted, as far as the rules of the Court are concerned, in the same manner, with the same warlike display and demonstration, as those which are waged and carried on in a spirit of animosity and real bitterness! The cause has to wade through the same forms of pleading, to wait the same delays, to progress by the same stages, as those which are not only in name, but in very deed, Law-suits;—so that the expense of a suit forced (it may be said) upon the parties concerned in it, and which though they institute, they institute ofttimes *involuntarily*, may be as great as the expense of one occasioned by

palpable injuries, and brought to vindicate undoubtedly infringed rights? Nay, the case of the Friendly suit is far the most grievous of the two, and for this reason.—In suits properly so called, that is, in contested suits, if the plaintiff succeed in proving a flagrant case of Injustice, the *defendant* has to pay, or on the other hand, if he fail to make out *any* case, then *he himself* has to pay, the costs; not his own only, but those of the opposite party as well:—but in a purely Friendly suit, where all parties on both sides of the record have conducted themselves properly, and there is no reason why one, more than another, should bear the costs, they have to come out of the property in question, diminishing thereby the amount ultimately distributeable amongst those entitled to it. *Here* the parties beneficially interested in the property, *must* be losers, to the extent of the costs of the suit;—*there* they may not be losers after all, the brunt of the battle being to be borne by the vanquished.

This is, assuredly, a lamentable state of things.—We have heard much said of late about cheap bread; but will cheap Law not be a boon scarcely less acceptable to those countless crowds, whose names figure through the eventful year in the books of the Registrars of Chancery? How few are there amongst us, as was excellently well observed in a late number of the Quarterly Review,* who are not, in one way or another, personally in-

* Dec. 1846, in the able article upon 'Tales by a Barrister.'

terested in this matter? Every one, more or less, in the course of his life, has something to do,—and therefore should be able to do it as easily as possible,—with Trusts, Executorships, and the other relations of real property. None so lowly as by reason of the meanness of his condition, none so exalted as by reason of the greatness of his station, to be indifferent to the Reform which I advocate. All alike, and at any moment, the poor man according to his weakness, and the rich man according to his might, may find themselves called into action, and compelled to take a part in the great drama of Municipal Law.

I would earnestly suggest then an entire remodelling of the Practice of our Courts of Equity, with reference to Amicable suits. Let us suppose, for example, the suit to be a Will-suit. Why should not a statement in the form of a Special Case, —being to the Court what the instructions on a Case for the opinion of Counsel now are to Counsel, or what cases sent from Sessions are to the Court of Queen's Bench,—be agreed on, and signed, be all parties interested under the will, mentioning the material part of the will '*in hæc verba*,' the dates of events, and the necessary heads of the family history. The case might then be presented *immediately* to the Court; if necessary, argued; and by it finally decided. If the Judge required further information as to facts,—as (for instance,) if the bequest were to certain objects, *as a class*, and not *nominatim*, and therefore it became necessary to know, and had not been sufficiently shewn, what

individuals composed that class, and whether they were all before the Court;—that information might just as well be presented in the shape of an Affidavit by the parties or others, at or before the hearing of the Case, as it now is through the circuitous expedient of a 'Reference' to the Master. A preliminary Affidavit of this kind is an indispensable appendage to some suits, in order to give to Equity a jurisdiction therein;*—an Affidavit is declared by Equity satisfactory Evidence of the title of claimants to a fund in Court; and *such fund*, notwithstanding the proverbial reluctance of the Court to do so, *is parted with upon the strength of that Affidavit.* Nay, such an Affidavit is after all, nine times out of ten, the only Evidence upon which the Master grounds his opinion on inquiries which are referred to him—then why should it not be also deemed sufficient Evidence to dispense with the tom-foolery of a 'Reference' altogether, and to establish at once the truth of the statements in the Case? If any of the parties to it can by their own knowledge, or by the knowledge of others, depose, or procure others to depose, on oath to the facts 'referred,' it is an act of wanton Injustice to postpone a decision of the cause by ordering those inquiries to be prosecuted elsewhere, and in a less summary manner. If any of the parties be not '*sui juris*,' as infants, or lunatics, let their guardians or committees be empowered to agree for them; of course being as responsible for all abuses of their

* 2 Dan. Ch. Pr. c. vi. s. 6.

power, as at present; and let a married woman's consent be as valid as that of any other person; for in Equity (and it is according to Equitable principles that the matter would be decided,) the old-fashioned notion is long since exploded of woman's incompetency; and even the Legislature now recognizes her power to deal with property as an intelligent and sensible agent. * What a load of revenue some such alteration as this would save the suitors, in this solitary case of Wills, may be imagined when the reader is told that it was remarked by Sir Matthew Hale, that, even in his day, 'since the Statute of Wills, † more questions not only *of Law*, touching the construction of wills, but also *of facts* arose than in any other five general titles or concerns of the Law besides.'‡ And that since the days of that great man, Will-cases have not diminished, and how immense a proportion of them are Friendly ones, the profession knows full well.

The same course, '*mutatis mutandis*,' might be pursued with respect to 'Administration,' and 'Creditors,' suits; except that in these the Accounts of the testator's property would have to be provided for and wound up. No doubt the complication arising from matters of 'Account' would necessarily render the final adjustment of suits of this nature, even though of an Amicable kind, more tedious

* 3 and 4 Wm. iv. c. 74; and 8 and 9 Vict. c. 106. s. 7.

† 32 Henry viii. c. 1. ‡ Treatise on enrolling conveyances. Real Property Commissioners' Reports, vol. 4. p. 2. n. 2.

than mere Will-cases; but I am here not so much complaining of the manner in which all suits are conducted *after*, as *before*, a decree has been obtained.—I inveigh against the mode in which they are first brought before the Court; and therefore Friendly 'Administration,' and 'Creditors,' suits might, as easily as Will-suits, be condensed into the form of short Special Cases, signed by the parties interested, and submitted to the Court for its directions. A common 'Administration' suit is scarcely ever anything more than a suit promoted by some legatee or devisee against the executors, asking for a more satisfactory account of the assets to be rendered *in Court*, than has been rendered by them *out of Court*. Any, the slightest, cause is sufficient to justify a discontented legatee in 'filing' his 'bill,' to the prejudice of the other legatees, who are generally joined in the suit, and whose costs have to be taken, it may be against their will, out of the common fund. So of 'Creditors' suits.' They are usually brought by one creditor suing for himself and the others, against his debtor's executor, who is expected to meet the case made by the plaintiff, by admitting every passage in it.—I say, this is the usual nature of 'Creditors' suits,' because they are in fact brought *by the connivance of the Executor against himself*. * Therefore it must be perfectly known by the Solicitors of both sides—who by the by are often one and the same firm—that the 'answer' will be but an echo of the

* Williams on Executors, 1505.

'bill;' and every purpose would be gained, if the Executor were simply to sign the 'bill,' as a token of his recognizing the truthfulness of it,—a legal validity being of course assigned to such signature. And what a sea of ink and mountains of paper would be saved; what reamsful of Solicitor's costs, and bagsful of Barristers' fees; which now have preference, in order of payment, over other debts;—so that an originally so'vent estate may be oftentimes eaten up by litigation, even in a Friendly suit, and *rendered insolvent*, before it becomes divisible among the prior legitimate creditors?—Who will not say that some such rule of simplification as this would be a benign one? Who would be harmed by it? None, save the Lawyers; and what patent have they for preying upon the substance, and prospering by the adversities, of their fellow men?

Charity suits, and suits for appointing new Trustees, and for 'specific performance,' are open to the same remarks. In the first, some one complains to the Attorney General, (as the *Custos* of all charities,) that a local or public charity, in which the complainant is interested either from personal or philanthropic motives, is not conducted according to the regulations of the founder, or requires revision and remodelling, owing to the alteration of times or circumstances; and upon that a suit is instituted by the Attorney General, if he approves of the suggestion, and the common consequences of all suits follow;—a *long* '*bill*,' and copies of it, —still *longer* '*answers*,' and copies of 'answers.'

Now here again, we are only at present concerned with *Friendly* suits, where the parties against whom the suit is brought, (generally the Trustees of the Charity,) are perfectly willing to submit to, nay court, a searching investigation of the management of their revenues, the design of the founder, and so on. The cause simply reduces itself to this,—the single *point* at issue through the whole gibberish, and verbiage, of the pleadings is this—whether the defendants *admit the gist* of the plaintiff's case,—and this they always do in a Friendly suit. Therefore the cause might just as well be brought *direct* to the Judge to adjudicate on, without the intervention of *any* pleadings: for pleadings imply, what Amicable suits deny—the pre-existence of a point in dispute.* The Attorney General, and the Trustees, and any other parties, might as well conclude themselves, by *signing the Case*, as they now conclude themselves by adopting *the pleadings:* only there would be this immense advantage and economy gained, that the Case would be the common Case of all, whereas now, there may be said to be a multiplication of it, just as many times as there are separate 'answers' and 'pleadings,' individuals and classes of individuals. In the case of suits to appoint new Trustees, the single object to be attained is, generally, the substitution, by the Court, of Trustees in the room of deceased, or retiring Trustees, where the parties having the power of substitution are incapacitated from exercising it,

* 'Pleadings are the *mutual altercations* between the plaintiff and the defendant.' 3 Bl. Comm. 293.

or where the original conveyance did not, as it ought, contain such a power. A statement of the creation of the trust,—of the deaths, or desire to retire, of the Trustees,—and of the disability, or desire to appoint, of the person seeking the assistance of the Court,—is all that would be required: the Court might immediately nominate the nominees of that person, if the Justice of the case demanded it; and the whole of that Justice might as well be disclosed in the more compendious form, as in the more prolix, which is now, most usually, a regular suit,* imitating in its mock solemnity all the ceremonies of a *contest*, and followed by a 'Reference to the Master' to do that which the Court is implored to do, viz. approve and appoint the new Trustees. The Court, observe, shifts the onus of complying with the plaintiff's requisition to the shoulders of the Master, and when asked to substitute the desired person, answers in substance, 'Go to the Master, and see if you can

* I say 'most usually,' because although sometimes the Courts appoint trustees on the more summary application by 'Petition,' yet they are so capricious in their construction of the Trustee Act, (11 G. IV., & 1 Wm. IV. c. 60,) and indeed the Act itself so fetters the liberty which it concedes of proceeding by 'Petition,' that the safer and more frequent way of effectuating the object is by a regular 'suit:' and even the proceedings on 'Petition' are clogged by a 'Reference.' Such innumerable questions have arisen on the construction of the Act, owing, it can hardly be doubted, to the very elaborateness with which it was designed, that this head of Chancery Practice might be materially simplified if it were replaced by a *less special* enactment.

prevail on him to do so, and if you can, then come back to us, and it shall be done.' *What the Court ought to do in every case, where the plaintiff tenders present satisfactory evidence in support of his petition, and all parties concur in the application,* is to give instant redress; and not to delay the suit by a 'Reference;' the utter uselessness of which is transparent, when we consider that it is sure to *issue in the way in which the plaintiff obtaining it wishes, and in almost the very terms in which he originally stated his complaint.*

Cases of 'specific performance' are on all fours with the preceding. Where they are Friendly suits, the defendant is perfectly willing to complete his agreement, (supposing him to be the purchaser,) if the title is good, and in ninety-nine cases out of a hundred the decree taken in the first instance is a mere matter of course, being a 'Reference' to the Master to see if a good title can be made, and when it was first made. And yet this decree has to be reached through the machinery of a litigated suit! *

* An Act (10 and 11 Vict. c. 90) has very lately received the sanction of Parliament, which will, it is hoped, be found effective in simplifying the conduct of some Friendly suits. But its scope is not large, and its scheme one of doubtful wisdom.

1. It applies only to cases of *money or stock held on express trust,* and therefore leaves untouched all the other diversified species of personal estate, as well as all kinds of real estate, and likewise all cases of *implied* trusts.

2. It is framed primarily for the protection of Trustees, and places it in their power to throw the parties beneficially interested into Chancery, however willing and competent those parties may be to agree upon their rights *out of Court.*

The above are some of the crying anomalies of the present practice of Equity, with reference to Friendly suits. They are of every day occurrence, familiar even to unprofessional observers of our Courts;—involving property of untold amount;—causing delays of infinite consequence;—and imposing an expenditure of ruinous extent!

Oh! that the profession which best knows these things, and is best able to remonstrate upon them, would, instead of contentedly lending its high talents to their enactment, rise indignantly, as one man, and demand a Purification of the System.

3. Whilst, on the other hand, parties who might be disposed to avail themselves of the provisions of the Act, may be prevented from doing so by the refusal of the Trustees to exercise the option given them by the Act. The Court must beset in motion by the Trustees. This is beginning at the wrong end.

The chief excellence of the Act is the avowal by the Legisture, *at length*, of its duty to substitute some less absurd mode of proceeding than a regular suit. Such an avowal, even in the limited range of cases within the Act, is a great boon: and if followed up in a liberal spirit of Legislation, may be made the groundwork of much ulterior good.

CHAPTER IX.

ON THE PUBLICATION OF LAWS.

It is recorded of ancient Rome, that the Law of the twelve tables—those masterpieces of Legislation—the consolidated wisdom of the wisest nation of antiquity—were displayed in a conspicuous part of the city, that he who ran might read them. There they were unfolded—in peace, what the eagles of the Republic were in war,—the living oracles to remind her citizens of their duties, and acquaint them with their rights. Imagination kindles at the thought of that free and noble people residing thus literally under the shadow of their own Laws. How we can in fancy follow the loyal crowds through those busy marts, as they trod the pathways watched over by the guardians of their liberties! How freshly we can picture to ourselves the feelings with which many a patriot burgher must have stood and gazed upon those silent monitors, and read in their hallowed tablets the great lessons of social life! On this, and much more, might the poet love to dwell. But are we sure that a deep moral also does not lie hid, behind this

example of former times? Is there no field for meditation opened up by it for the political philosopher and statesman of our days? How does the case stand with us? We have indeed a maxim, uppermost on the lips of our Judges, and *supposed* to refute triumphantly the plea of ignorance, which many a wrong-doer might advance, 'Ignorance of the Law excuses no one.'* But do we take any measures for preventing the possibility of a truthful allegation of such an excuse? Nay, does there exist the possibility of our citizens *knowing* that, which it is imputed to them as a thing inexcusable to be *ignorant* of?

Let us look back only a dozen years, and then cast our eyes forward to the present time, and see how month after month has brought fresh accessions to the Statute Book, till at length the very Judge himself, who it may be has given them birth, is bewildered, and the Barrister who has to master them, is utterly lost, in the maze of their entanglements.† How far *this* Statute has repealed or varied *that; which* change and alteration is the

* 'Ignorantia legis neminem excusat.' 1 Coke's Rep. 177.

† The same is true of the 'General Orders' of the different Courts, issued under the authority of Acts of Parliament. Those who would form a conception of the *ne plus ultrà* of Judicial intricacy, would do well to consult the 'Orders' which the Court of Chancery has issued during the last twenty years. That a—*perhaps the*—most sagacious Equity Judge declined to ratify with his high authority the last grand Chancery budget, is a strong intimation, (which it would be well to attend to,) and not the less significant, because negatively conveyed, of the inexpediency of these periodical accumulations. It is frightful to

latest; *what* is, for the time being, to be regarded as the standard of Civil Rights and Wrongs,—are questions so far from being easy to be understood *by all*, that they are for ever engaging the discernment, and racking the vigorous intellects, of those who minister in high places. And shall we ascribe universality of knowledge to that, which is, at best, but feebly and imperfectly apprehended by a few? Can we be bold enough to impute, by any fiction of Law, an inevitable acquaintance with its requirements to those, who have not even the power of gaining access to it? Yet this, or nothing, is what the maxim in question presupposes. Is it not rather, in fact, a staring falsehood to say that men know what is Law; and a glaring Injustice to subject them to the consequences of transgressing that, which they do not know to be forbidden?

And as of their *Liabilities*, so also of their *Rights*. Men may, it is true, be sooner sure of what they have not, than of what they have, a right to. It may be easier to inform them of what is not,

think of the complication which each succeeding year is adding to the study of English Law. If the Lawyer of 1850 writhes under the ever-accumulating load of 'Cases to be noted,' 'Reports to read up,' 'Points of Practice' to keep pace with, *conflicting* decisions to balance or reconcile, and *overruled* decisions to expunge,—how will it be with the Lawyer of 1900? If our forefathers were happy, as compared with us, at least in not living under a reign of everlasting Appeals, reversed Decrees, and centuries of Orders, with its armies of Reporters and Sub-reporters, parturient Editors and Re-editors, and weekly and monthly Reviewers, and above all with its restless Statute-Book, ever repealing, amending, reviving, and re-enacting—what incalculable toil must be in store for the next generation!

than of that which is, their lawful due. And it is for this reason, amongst others, that we find Commandments taking, for the most part, in their enactments, the language of negation, rather than affirmation. But still, as to men's positive Rights, have there ever been any public means adopted for rendering notorious to the public at large, I say not the details but, the mere outline of their social position and privileges? How the results of the labours of each succeeding Session come *at all* abroad, or find their way beyond the shelves of those professionally concerned in them, I know not;—certain however it is, that a vague notion of what has transpired *does* with difficulty exude beyond the precincts of St. Stephen's, and the Inns of Court, before the expiration of the next year; but this is a hap-hazard and piece-meal knowledge. The Acts are indeed printed by Her most excellent Majesty's printer, and this is declared, parliamentarily, to be Publication; and the 'Public General Statutes' form a conspicuous item in the libraries of a few; aye, and there is the possibility of purchasing them at a guinea or two per volume, but what are they, who possess them, for the most part, the wiser? Who amongst them shall aspire to unravel the deep mysteries of those fathomless pages? Who dare to interpret, without diffidence, a single page in our written code of Law? To the bulk of the people, however, even this access is, as a matter of fact, absolutely denied. Buy they cannot—understand they could not—yet interested in them, and principally so, they are. But if, by

a kind of parliamentary decimation, the chief practical contents were singled out, and, like true *literæ patentes*, displayed in the chief places of concourse, whilst the originals in their entirety still remained accessible to those who might require a closer inspection of them, among the repositories of the Courts; who can say what results of good, might not follow? 1. All men would have an opportunity of knowing the Laws: thenceforth it would be their own folly, if they did not learn them, and their own wilfulness, if they did not obey them.

2. Every man might be his own Lawyer, and instead of, as now, consulting others on his personal rights, (which no one *ought* to know so well as himself,) he would be able, at least in all ordinary cases, to determine on them, and act for, himself. Law would be no longer an hidden, barren art; but a vivifying, catholic, rule of action.

3. The power and presence of the Law being thus continually before men's eyes, its terrors would be more visibly impressed upon the unruly, and its protection proclaimed to, and welcomed by, the obedient.*

And if the illiterateness of the multitude, and the arduousness of such a scheme, be objected, let us reflect in the first place, that if, as is the case, men are without exception held responsible for the *violation* of Law, they must *à fortiori* be held capable of *comprehending* that Law; and secondly, that though Law is legionlike in its details, the princi-

* Proclamations by the Executive are in fact, on a small scale, the publication of Law on extraordinary occasions.

ples upon which it depends are comparatively few and simple. To test the legality of any act, few principles need be called into exercise;—to explain its bearing, few words are necessary. And therefore perhaps it is, that the great moral lessons of Revelation are laid down in the form of general and concise dogmas, the application of which to particulars it is left to the Reason and Conscience of the agent to infer. So of human enactments. The marginal note of the 'Report,' the summary of the 'Act,' is sufficient to convey a clear general notion of the thing decided, and the reason why;—nay, they ofttimes convey it more effectually than the perusal of the body of the context would. It is the descent into details that embarrasses and perils the judgment,—for they are infinite; and any attempt to present them under every possible combination, whilst it betrays the infirmity of the human mind, begets difficulties and doubts which a general view would never have suggested.

What has been said of the written Statute Law, seems equally true of, and is intended to be applied to, the unwritten Common Law, or,—as it might henceforth be more properly called, according to the fusion of principles above suggested,—'Common Equity.' Some universal knowledge of it should be imparted alike to rich and poor. The farmer as he drives his steers to the neighbouring market, the labourer as he wends his way to the village shop, after a week of toil, to lay in on the eve of the Day of Rest his household store;—nay the very houseless wanderer who claims from door to door the pittance due to destitution, should be ne-

abled to know somewhat of his Legal rights and responsibilities, as well as the Peer who drives in cushioned cabriolet, to elicit some eighty penny lore from the man of sheep-skins. In every market-place, on every town-hall, should be emblazoned in characters indelible,—as in one of England's choicest seminaries are the regulations of its scholars,*—the duties and the liberties of the people. 'England expects every man to do his duty,' were the warning words of the dying hero which still ring in our ears; and splendidly did he illustrate the duties of her warriors in her hour of need. But there are duties of a more peaceful kind that we civilians are summoned to on shore, and those duties must be known,—and how shall they be known, if not heralded through the land? We too have a throne to rally round,—Crown rights to reverence and support,—Authority to submit to,—Equals to do Justice by,—aye, and Rights to inherit and transmit to posterity; and shall these be a sealed mystery to the community; an enigma unnamed by the million; a thing impregnable, save to the traffickers in it?

To this diffusion of the knowledge of Law the growing thirst for, and the improvements in, education which characterize our age, might be made wonderfully to conduce. Instead of tracing and retracing the profligate romance of poetry, and the fabulous annals

* In the school-room of Winchester College is hung in a conspicuous place a table of the Laws of the College, well known to the Wykehamists as the 'Tabula Legum Pædagogicarum.'

of Pagan mythology ; instead of groping to the very verge of manhood after an imperfect smattering in the dead languages,—babes in their ignorance of the living,—the youth of the Aristocracy might ere long be seen laying in boyhood the foundation of a sound acquaintance with the principles of that Law which hereafter they may be called on to administer or enact,—whilst the sons of our Peasantry, blending with less intellectual studies an habituation with, at least, the rudimental rights of citizenship, and knowing with an honest pride, that they are personally interested in the matter, might render a grateful and unconstrained obedience to the Laws, which shall vigilantly and impartially respect them.

But above all, to the fusion of the diverse principles of our Municipal Law might we look with hope, as the means of bringing a knowledge of it within the compass of education, and of breaking down the barrier of exclusiveness which now reserves it for so small a portion of mankind. Might we not regard it as one of the best blessings of such a fusion, that it would tend to level our Laws to the capacity of any honest unprofessional inquirer after them? How fair a fabric might thus be raised from the ruins of the past! Like that fair decoration of mediæval architecture, which grew uniform, and alone, out of the intersecting materials of the ruder elder arch,—so out of the elements of our old Judicial architecture, which have as it were hitherto run into, and crossed, one another with a cumbrous and needless regularity,

might the lineaments of one consolidated form be designed ;—gathering to itself the beauties, which strayed over the separate parts which composed it, yet sustaining in single and unrivalled symmetry the Temple of Justice!

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